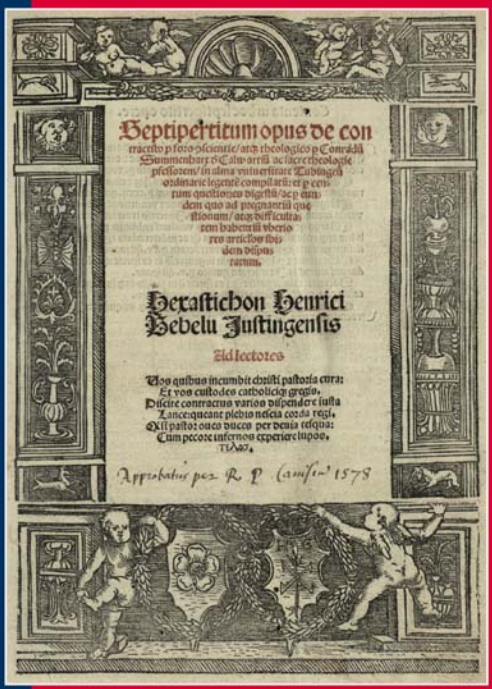
STUDIES IN MEDIEVAL AND REFORMATION TRADITIONS

Conrad Summenhart's Theory of Individual Rights


Septipertitum opus de con
Hexastichon Henrici
Bebelu Iustingensis
Ad lectores
Vos quibus incumbit ciuili pastoris cura:
Et vos custodes catholicæ gregis.
Discite contractus varios dispendere iusta
Lance: queant pleblis nescia corda regi.
Nil pastor ouco pauco per deuia relinquat:
Cum pecore infernos experiare lupos.
Approbatur per R. P. (anno) 1578

Jussi Varkemaa

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BRILL

Conrad Summenhart's Theory of Individual Rights

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Conrad Summenhart's Theory of Individual Rights

By
Jussi Varkemaa

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INTRODUCTION

In recent decades scholars have shown considerable and steadily increasing interest in medieval discussions of rights. This interest has largely been motivated by a search for the origin of the modern idea of individual or natural rights. Although the merits of this approach in terms of research results are undeniable, there has also been criticism to this research. The dissatisfaction has not concerned the general motivation for the research as much as the way this motivation has affected the research methodology. Often the search for the origin of modern rights has included the application of modern classifications to medieval concepts. Such an approach is problematic, even though a skillful researcher could avoid the pitfalls of anachronisms, which are ever present in historical research that focuses on the genealogy of ideas.

One problem is the plurality of notions that characterizes the modern discourse on rights. What is the modern idea of an individual right? Or more precisely put: What in the complex of ideas associated with rights should be considered the foundation of the modern view of individual or subjective rights?[1] This may not be too big a problem, however, for the search for the origin of modern rights language may help us to answer this question and thereby to contribute in an important way to the clarification of our modern concepts.

A more profound problem arises in the way the search-for-origins approach imposes a paradigm on the pre-modern discourse of rights. In its most widely manifested form, this paradigm appears in the premise that the concept of an individual right presupposes a well-articulated philosophical theory of the individual or individualistic philosophy. This presupposition characterized the thesis advanced by the modern French legal historian Michel Villey in several of his writings. For Villey, the key figure in the medieval history of right(s) was the Franciscan William Ockham (c. 1287–1347). According to Villey, when Ockham consulted the traditional language of *ius naturale*, he transformed it on the basis of his nominalistic, individualistic

[1] This question has been raised by Annabel Brett. See Brett 1997, 2.

philosophy. The concept of an individual or natural right was the outcome of this constructive reinterpretation of *ius naturale*.[2] I am referring to Villey's thesis here as an example of associating the history of rights language with the paradigm of organic growth or development toward modern individual rights.[3] This paradigm, which is concomitant with the search-for-origins approach, should be recognized and discounted. It easily leads to an analysis in which the premodern language of rights is treated literally as pre-*modern* and is not given proper treatment in its own right. This can hardly contribute to a reliable view of the history of individual rights. Furthermore, it is doubtful whether the search-for-origins approach will satisfactorily accomplish its aims. This is evidently the case if the origin turns out to be too complex to fit into the paradigm of development or even less that of organic growth or "the birth of individual rights." The results may be bewildering: we are confronted with formulations or idioms that could be classified as modern or pre-modern, but which are surrounded by other idioms seemingly inconsistent with modern ways of thinking about rights. Which should we prefer or emphasize then, the continuity or the discontinuity? This perplexing situation might generate lively academic discussion, but it could also indicate that the medieval theorizing about rights cannot be grasped with the conceptual tools derived from modern discourse.[4]

A more balanced inquiry has been suggested as a necessary substitute for the search-for-origins approach, an inquiry that 1) dissociates itself from viewing the history of rights as a gradual progress toward modern individual rights, and 2) approaches the history of rights as the history of language.[5] Here, the primary interest is on the use of

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[2] See e.g., Villey 1964. For a detailed exposition of Villey's arguments and the objections to them, see Tierney 1997, 13–34. Since its first publication in the 1960s, Villey's thesis has been highly influential and it has served one of the major catalysts for the growing interest in medieval rights discourse. Yet, Villey's interpretation has also been criticized for its constructivist approach to the language of rights as well as for placing too much stress on the unity of thought of a given author. As for Ockham, it has been pointed out that the connection between his philosophical preferences or metaphysical doctrines and his language of rights is by no means simple or well-articulated enough to support Villey's thesis.

[3] In Villey's view, we may even speak of the birth of individual rights in Ockham's treatment. Villey 1964, 98.

[4] Recently, this point has been made by Janet Coleman. See Coleman 2006.

[5] See Brett 1997, 7. Brett names James Tully and Brian Tierney (along with herself) as representatives of this approach. Brett 1997, 3.

language in its historical context. This approach calls for dissociation from the application of modern concepts to medieval language and also avoiding the kind of abstraction whereby the language of a given theorist is explained in light of a broader, philosophical conviction such as nominalism or voluntarism. Paradoxically or not, the outcome of this kind of historical research could be a more reliable picture of the origins of the modern concept of individual rights.

The present study focuses on reconstructing the theory of individual rights set forth by the German theologian Conrad Summenhart (c. 1458–1502) in his massive *Septipertitum opus de contractibus pro foro conscientie atque theologico* (henceforth *Opus septipartitum)*.[6] The central question to be examined is: How does Summenhart understand the concept of an individual right and its immediate implications?

My basic presumption is that, in *Opus septipartitum*, Summenhart was in fact writing about individual or subjective rights. With this assumption my study takes the kind of approach in which the medieval discussion on rights is mirrored in modern ideas about individual rights. I will not, however, seek to present Summenhart as a forerunner of modern rights theories, nor will I approach his formulations with the explicit purpose of extracting expressions that could be classified as modern. I describe Summenhart's theory as a theory of individual rights with the idea that the modern reader who is acquainted with modern rights discourse will recognize the continuity and accept that Summenhart's theory could be called a theory of individual rights. Yet the modern reader should also be able to appreciate the differences that exist between the modern discourse and the discourse in which Summenhart took part with his theory.

By saying that Summenhart has a *theory* of individual rights, I refer to his use of the Latin term *ius* in a reflective way: he not only employs the term *ius*, but also explains how this term should be understood. Further, he follows the implications of this concept and makes them explicit in a way that could be characterized as theorizing on rights. He also makes considerable effort to systematize the language of rights.

The focus of my analysis will remain on Summenhart's language of rights. In order to elucidate the intellectual context of Summenhart's theory, I will examine the previous medieval discourse on individual

[6] *Opus septipartitum* is best known for its progressive views on political economy. See Ott 1957 and Noonan 1954, 233–235, 340–344; Oberman 1977, 171–175.

rights. My narrative will be partial and selective; the intention is not to deliver a comprehensive account of the late medieval rights discourse, but rather to trace one line of discussion, which I take as culminating in Summenhart's contribution. The selection of authors to be discussed is thus defined by my interest in elucidating Summenhart's theory.

My approach has a certain internalist emphasis—something that is invited by the nature of Summenhart's "speech act."[7] Summenhart's account of rights is first and foremost a theoretical enterprise. As far Summenhart's intentions can be recovered, his primary intention seems to have been to clarify a rather complex and ambiguous terminology that formed the corpus of rights language and in that way contribute to the meta-level of late medieval rights discourse. Summenhart also used his language to articulate contextual claims, and I will try to elucidate these whenever I recognize them. It can even be said that it is this connection to historical context and legal practice that makes Summenhart's work interesting; it is not just theorizing as an academic maneuver but theorizing that is relevant and serves the practice. Summenhart's explicit effort to connect his conceptual discussion to the contemporary juridical language reinforces this impression. However, to do justice to Summenhart's discussion and give a balanced account of his work, theory rather than practice must be regarded as the primary context of Summenhart's writing.

Conrad Summenhart was a German theologian whose academic career culminated with a professorship in theology at the University of Tübingen. Summenhart was born in 1458 at Calw, which was a Swabian town in the northern part of the Black Forest. He began his studies in Heidelberg in 1472, receiving his *baccalaureus artium* degree the following year. Summenhart continued his studies in Paris and was conferred the degree of *magister artium* in April 1478. Later that year he returned to his home district and became a master in the faculty of arts at the University of Tübingen, which had been founded only the year before. In 1483 Summenhart was again appointed as regent master in the faculty of arts, which indicates that he must have temporarily left Tübingen. This time, he returned to Tübingen for good. The next

[7] I will not, however, approach the notion of an individual right as an "unit idea" or otherwise try to "get behind the back of language." For different approaches within the discipline of intellectual history, see e.g. Kelley 2005, Clark 2004, 138–145; Tully 1988.

year Summenhart was elected the rector of the University and was re-elected three times (in 1491, 1496/7, and 1500).[8]

In January 1484 Summenhart began studying in the faculty of theology as *baccalaureus*, first in Bible reading and then, in 1485, in commenting upon the *Sentences* of Peter Lombard. His departure from the faculty of arts was not abrupt, however. During the academic year of 1487–88 he was still acting as the dean of the faculty of arts. Summenhart did not receive his degree in theology until October 1489, as the degree could not be granted to a candidatae under thirty years of age. At the beginning of his second rectorate, in May 1491, he finally joined Gabriel Biel as a professor in theology at the university. While Biel held the chair of the *via moderna*, Summenhart became the *ordinarius* of the *via antiqua*, which in Tübingen was oriented toward Scotist thinking.[9] Summenhart's professorship lasted a decade. In 1501 Tübingen was infected by the plague, an event that ultimately seems to have led to the end of Summenhart's career. Summenhart evacuated to the Schuttern Abbey in Lahr, where he died on October 20, 1502.[10]

The published works of Summenhart neatly profile his interests as a theorist. Summenhart had long-term working experience at the faculty of arts and was well acquainted with natural philosophy. In this field, his contribution was the *Summa naturalis* or *Commentaria in summam physice Alberti Magni* (published posthumously in 1507). His major interest, however, was in the questions of practical morality that had relevance in the fields of (canon) law and theology. In this area Summenhart was a self-conscious theologian who did not avoid confrontation with contemporary lawyers. In 1493 he wrote his *Tractatulus exhortatorius ad attendendum super decem defectibus virorum monasticorum* (published in 1498), which criticized the contemporary monastic way of life with its orientation both mundane and luxurious.[11] This work showed Summenhart's sympathies to ecclesiastical reform, which also appear in his critical theses on tithes, the *Tractatulus bipartitus de decimis* (1497). Summenhart argued that the

[8] Feld 1992, 86.

[9] Oberman 1977, 34–35. Summenhart was educated in the circles of *via antiqua*. He began his studies in Heidelberg, which was a center of *via antiqua*, and continued them in Paris at a time when nominalist teaching was banned by Louis XI.

[10] Feld 1992, 87.

[11] The exact target of Summenhart's criticism was the Benedictine abbey at Hirshau. Summenhart's tract contributed to the pre-Reformation debate on the integrity of religious life. See Feld 1990, 99–104.

practice of tithing, as pursued in the late medieval church, was not based on divine law, but instead on man-made canon law. In stressing that church legislation as human law has its own territory that should not be overstepped Summenhart was very much the heir of Jean Gerson (1363–1429), of whom he thought highly. Like Gerson, Summenhart was concerned with liberating the area of conscience from the ever-multiplying regulations of canon law. He also wanted to defend the leading role of theology in moral matters.[12] These emphases were manifested in Summenhart's main work, a massive thesis of casuistic moral theology: *Septipertitum opus de contractibus pro foro conscientie atque theologico.* The work was first published in 1500, two years before Summenhart's untimely death and was reprinted four times during the sixteenth century.[13]

The subject matter of *Opus septipartitum* consists of analyses of contractual situations that are related to economic transactions. In Summenhart's time, as today, this was a subject that was fundamentally defined by lawyers. The characteristics of Summenhart's approach are given in the title of his book. He reviews contractual cases, not as they appear in the courts of law, whether civil or canon, but as they appear in the court of conscience and from the viewpoint of theology. *Opus septipartitum* had a practical incentive: instruction in how to conduct business with a good conscience. *Opus septipartitum* is not, however, a popular manual for the businessman or for the priest in daily confessional work. Instead it is clearly written for an academic audience.[14]

Opus septipartitum consists of seven parts or treatises comprising a total of one hundred questions. There is an individual treatise on

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[12] Oberman consideres Summenhart as a representative of what he calls the "first Tübingen school": "This was an academic tradition characterized by groundbreaking scholarly activity between the fronts of theology and law where Gabriel Biel and especially Conrad Summenhart addressed fiery issues of social ethics that alternately smouldered and flamed during the entire sixteenth century." Oberman 1981, 61. For an interpretation of this school, see Oberman 1977, 77–78, 146–156, 159–163.

[13] In 1513 and 1515 by the original publisher, Heinrich Gran in Hagenau, and in 1580 by two Venetian publishers. I have used the original 1500 edition by H. Gran. For an introduction to Summenhart's works, see Feld 1992. On Summenhart's career, see Haller 1927, 172–187.

[14] *Opus septipartitum* can be placed in "the literature on contracts and cases of conscience." See Brett 1997, 23, 34; Trusen 1990. The bulk of the work consists of detailed casuistic analyses in which Summenhart utilizes scholastic methodology with results that are often as exhausting as they are exhaustive.

loans (*mutuum*), on the contract of sale (*emptio et venditio*), a specific case of the sale of *census* or *redditus*, partnership (*societas*), lease (*locatio et conductio*), and exchange (*cambio*). The work begins, however, with a preliminary treatise, which is meant to prepare the reader for the actual casuistic working of the other six treatises. This preliminary material includes a fully developed theory of individual rights. Summenhart thereby placed individual rights at the center of applied ethical reasoning.

Summenhart's discussion of rights in *Opus septipartitum* has been acknowledged in modern scholarship, although no monographs have been devoted to his language of rights.[15] Several scholars have noted Summenhart's influence on the sixteenth-century Spanish scholastics and have reviewed his language of rights from this perspective. Paolo Grossi referred to Summenhart's language in his article "La proprietà nel sistema privatistico della seconda scolastica" (1973). In general, Grossi emphasized the fundamental importance of medieval voluntarist theology of fourteenth-century Franciscan scholasticism. According to Grossi, the individualism embedded in the voluntarist theology made it plausible to think of dominion and rights in terms of the liberty or freedom of the individual.[16] Grossi took this as a transformation of the medieval language of rights that was fundamental enough to explain Summenhart's language of rights as well. Grossi paid special attention to Summenhart's definition of dominion in terms of faculty. According to Grossi, in defining dominion as a faculty Summenhart took faculty to mean the power of the subject, not in the sense of pure potentiality, but in the sense that denoted the liberty of the individual.[17]

Kurt Seelmann also viewed Summenhart as a source for sixteenth-century Spanish scholastics in his *Die Lehre des Fernando Vazquez de Menchaca vom Dominium* (1979). Seelmann questioned the validity of Grossi's interpretation of the all-embracing influence of Franciscan voluntarism for medieval rights discourse. Seelmann took Grossi's approach as representative of *geistesgeschichtliche* construction, in which the semantic connections between the usage of a term in different

[15] The only general monograph on Summenhart is Franz Linsemann's *Konrad Summenhart. Ein Culturbild aus den Anfängen der Universität Tübingen* (1877).

[16] Grossi 1973, 134–135. Grossi's views also emerge in his article "Usus facti. La nozione di proprietà nella inaugurazione dell'età nuova" (1987). See Grossi 1987, 1–58.

[17] Grossi 1973, 201.

contexts or by different writers were assumed rather than carefully studied. In his own work, Seelmann set out to study these semantic connections by identifying the sources on which Vázquez and other Spanish scholastics relied in their interpretations.[18] This perspective defined his approach to Summenhart. He did not seek to present a general interpretation of Summenhart's language of rights, but focused on certain formulations that could have influenced Vázquez's language.

In his *Natural Rights Theories* (1979), Richard Tuck discussed Summenhart's formulations as a part of a development that led to early modern natural rights theories. Although Tuck did not provide any detailed analysis of Summenhart's language, Tuck valued the German as an important figure in the formation of the so-called "first rights theory."[19] Tuck emphasized the importance of the equivalence of right and dominion that was part of Summenhart's language. According to Tuck, Summenhart's equivalence of a right with dominion indicated "an active rights theory, in which to have any kind of right was to be a *dominus*, to have sovereignty over that bit of one's world."[20] Tuck's interpretation, which makes use of the modern distinction between active and passive rights, has been criticized by later interpreters. Annabel Brett and Brian Tierney have pointed out that Tuck, like Grossi, failed to recognize the way that Summenhart specified the terms 'dominion' and 'faculty' in order to achieve an equivalence between a right and dominion or a right and faculty. Tierney has further pointed out that the modern distinction between active and passive rights does not fit the medieval discourse on rights.[21]

Brett's *Liberty, Right, and Nature* (1997) and Tierney's *The Idea of Natural Rights* (1997) contain the most detailed analyses of Summenhart's language of rights currently available. In both studies there is a separate chapter dedicated to analyzing Summenhart's *Opus septipartitum*.[22] As to the basic approach, there are some important similarities between the two studies. Both Tierney and Brett focused on the language and took a negative stand vis-à-vis abstract generalizations and the application of modern classifications of medieval texts. Yet Tierney also sympathized with the inquiry into the geneal-

[18] Seelmann 1979, 7–13.
[19] See Tuck 1979, 5–31.
[20] Tuck 1979, 28.
[21] Brett 1997, 38; Tierney 1983.
[22] See Brett 1997, 34–43, and Tierney 1997, 242–252.

ogy of ideas and even made an effort to point out the medieval roots of modern concepts.[23] By contrast, Brett explicitly dissociated herself from the approach by which medieval discussions were reviewed for the purpose of identifying the origins of the modern concept of individual rights. She defined her approach as an effort "to recover the variety of the senses of the term *ius* as employed to signify a quality or property of the individual subject in late medieval and renaissance discourse."[24] Brett paid special attention to the genres of scholastic literary production. According to her, the literary genre imposed restrictions or constraints on the writer's terminology. From this viewpoint, Brett took the medieval discussions on rights as genre-dependent in a relevant way. She placed Summenhart's *Opus septipartitum* in "the literature on contracts and cases of conscience" and maintained that the basic semantics of Summenhart's language was derived from that literary genre.[25] Although Brett's claim of the constraining influence of the literary genre might seem plausible in the abstract, in practice it faces problems. In particular, Summenhart's language was highly dependent on Jean Gerson's and Antoninus of Florence's language of rights, which are representatives of two other literary genres in Brett's classification. As far as Summenhart is concerned then, this emphasis on the separation of literary genres blurs the semantic connections that are elementary for understanding Summenhart's language of rights.

While Brett's discussion of Summenhart was confined to the basic concept of an individual right, Tierney discussed Summenhart's account of the species of dominion. Unfortunately, Tierney's interpretation remains unsatisfactory, because he failed to recognize Summenhart's conscious effort to systematize Gerson's language of rights, which was the basic rationale for his conceptual work.[26] As far as Summenhart's basic concept of an individual right is concerned, Tierney's and Brett's conceptual analyses were for the most part accurate, and can also be read as mutually complementary. Yet it should be noted that neither Brett nor Tierney managed to grasp fully the fundamental role that

[23] In this respect, Tierney emphasizes the relevance of the language developed by the twelfth-century canon lawyers. See Tierney 1997, 43–77.
[24] Brett 1997, 7.
[25] See Brett 1997, 7, 25–26, 34, 38.
[26] See Tierney 1997, 250–251.

the concept of liberty played at the heart of Summenhart's concept of individual rights.[27]

Modern studies of Summenhart have neglected his discussion of the juridical property rights of *usus, usufructus, proprietas,* and *possessio*.[28] Whatever one thinks of the quality of Summenhart's treatment of this issue, this lack of attention is noteworthy. It conveniently reveals a feature that has characterized scholarly interest in Summenhart: his discussion on rights has not been treated as a conscious effort to create a comprehensive theory. The present study starts from the assumption that Summenhart set out to write a theory of individual rights, which in the context of *Opus septipartitum* also called for an account of juridical property rights.

[27] Both Brett and Tierney see a confusion in Summenhart's language on liberty, although not on the same matter. See Brett 1997, 43, and Tierney 1997, 248–249. For Summenhart's basic concept of an individual right, see also Varkemaa 2005; 2006.

[28] Feenstra has briefly reviewed Summenhart's discussion on juridical property rights, and Burns has provided a short summary of Summenhart's discussion of the origin of property. See Feenstra 1978, 217–219; Burns 1991, 145–146. Bollinger reviews Summenhart's discussion of the origin of property as part of the Scotist tradition that influenced Huldrych Zwingli. See Bollinger 2003, 467–472.

PART ONE

THE BACKGROUND

CHAPTER ONE

MEDIEVAL DISCUSSIONS ON RIGHTS

In medieval times rights were discussed in several different contexts. The middle of the thirteenth century saw the beginning of a debate that was specific in nature, but later came to have a general influence on the discourse of rights. The object of this particular debate was the juridical definition of the ideal apostolic way of life, which had been developed within the Franciscan mendicant order. The Franciscans did not claim rights for themselves, but rather defended the legitimacy of renouncing all rights to material property. The status of simple users without any rights or dominion in this world was an essential part of the self-understanding of the Friars Minor, but at the same time it was a juridically peculiar position, one that was prone to provoking opposition.[1]

The dispute over the definitions of apostolic poverty began as an academic quarrel at the University of Paris in the middle of the thirteenth century when secular masters, whose teaching positions were contested by the rapid invasion of mendicant masters, questioned the entitlement of both Franciscan and Dominican modes of Christian life. However, during the last decades of the century, as the controversy was detached from its original context, the old front lines broke down, and it was precisely the Franciscan ideal of poverty that came to form the center of the dispute.[2]

The controversy was articulated around the elevated theme of the most perfect mode of Christian life. Following the traditional emphasis of religious perfection, the mendicants explicitly separated themselves from secular modes of life and claimed the status of perfect human living.[3] Anti-mendicant polemicists arose to deny this claim. The indisputable starting point for all the participants in the controversy was

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[1] Several scholars have considered this debate significant for the development of the medieval language of rights. See Tuck 1979, 20–24; Brett 1997, 11–20, 50–68; Tierney 1997, 93–130; Mäkinen 2001.

[2] On the origin and development of the debate, see e.g., Leff 1967, 51–255; Mäkinen 2001, 21–33.

[3] For the history of religious perfection, see Flew 1968.

the conviction that the perfect way of life had its historical example in the earthly life of Christ and his apostles.[4] It was also taken for granted that this human perfection dictated something about man's relation to the things of this world. In general, the mendicants emphasized voluntary poverty as an expression of religious perfection. Poverty was thought to be an immediate response to Christ's explicit dictates: "If you wish to be perfect, go and sell your possessions and give the money to the poor" (Matt. 19:21). Despite their common starting point, the Franciscans and the Dominicans gave different interpretations of this call to poverty. In short, the Franciscans saw the renouncement of material things to be essential or constitutive of religious perfection, whereas the Dominican view was more moderately tuned.[5] Thomas Aquinas (c.1224–1274) stated his conclusion in the *Summa theologiae* as follows:

> Renunciation of one's own can be considered in two ways. First, as being actual, and in that sense it is not essential of perfection, but rather, it is a kind of an instrument of perfection…Secondly, it can be considered in relation to the preparedness of the soul, so that one is ready, if needed, to leave or give away everything. And this belongs directly to perfection.[6]

Aquinas's words defined what was to become standard Dominican policy. Emphasis was placed on the appropriate disposition of the soul rather than on the actual renunciation of material things, which led the Dominican order to adopt a modest practice: the Dominican brothers did not own anything in private, but held everything in common in the sense that they—taken as the order—had common ownership (*dominium*) of the things they possessed. Thus, the Dominican ideal of apostolic poverty excluded only private possessions. The Franciscans, however, denied the possibility that Christ or his apostles

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[4] The relevant and most commonly cited verses in the Bible were Matthew 19:21, Luke 5:27–28, and Acts 4:32.

[5] On Dominican poverty, see Hinnebusch 1965, 145–168. On Franciscan poverty, see Lambert 1961; Mäkinen 2001. To be precise, it is actually misleading to speak of the Franciscan or the Dominican view of apostolic poverty because there were several views of dominion and *usus* in both orders. See Madigan 1997.

[6] Thomas Aquinas, *Summa theologiae*, 2a2ae, q.184, a.7, r. 1: "…abrenuntiatio propriarum facultatum dupliciter considerari potest. Uno modo secundum quod est in actu. Et sic in ea non consistit essentialiter perfectio, sed est quoddam perfectionis instrumentum…Alio modo potest considerari secundum praeparationem animi: ut scilicet homo sit paratus, si opus fuerit, omnia dimittere vel distribuere. Et hoc pertinet directe ad perfectionem." There has been discussion of whether Aquinas's earlier attitude to material was more strict one. See Eijden 1994, 31–68.

owned anything at all, even jointly. They maintained that Christ and his apostles were poor in the specific sense that they had nothing. This conviction led the Franciscans to adopt an extreme and legally peculiar position: the Franciscans—seen as individual brothers and also as a religious order—did not own anything.[7]

1.1. *Bonaventure*

During the thirteenth century the Franciscan ideal of poverty was articulated and defended by the leading Franciscan theorists. Bonaventure (c.1217–1274) presented a significant legal formulation in his *Apologia pauperum*. In chapter 11 he interpreted the rule "Let the Friars appropriate nothing for themselves, neither a house, nor a place, nor anything else" in legal terms in order to justify the Franciscan profession. He stressed that

> We should understand that since four things are to be considered in temporal goods—ownership (*proprietas*), possession (*possessio*), usufruct (*ususfructus*) and simple use (*simplex usus*)—and since the life of mortals is possible without the first three but necessarily requires the fourth, no profession may ever be made that renounces entirely the use of all kind of temporal goods. But that profession which implies the willful vow to follow Christ to the extremities of poverty most fittingly calls for renouncement of *dominium* over anything whatsoever, and must be content with the limited use of things belonging to others and conceded to it.[8]

Bonaventure's account shows a familiarity with the contemporary juridical language. In medieval juridical discourse the most common

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[7] The Rule of St. Francis explicitly stated that "the friars are to have no property; Franciscan candidates should sell all possessions and give the money to the poor." Cited and translated in Coleman 1988, 632. However, St. Francis's rule was scant in its simplicity and—as Coleman has stated—did not reflect on "whether he intended the renunciation of all common as well as all individual property." Ibid. The specific legal formulation of the Franciscan position was the task of the later theorists. See Coleman 1988, 631–637; Mäkinen 2001, 57–94, 174–190.

[8] Bonaventure, *Apologia pauperum*, cap. XI, 312: "…intelligendum est, quod cum circa res temporales quatuor sit considerare, scilicet proprietatem, possessionem, usumfructum et simplicem usum; et primis quidem tribus vita mortalium possit carere, ultimo vero tanquam necessario egeat: nulla prorsus potest esse professio omnino temporalium rerum abdicans usum. Verum ei professioni, quae sponte devovit Christum in extrema paupertate sectari, decens fuit universaliter rerum abdicare *dominium* arctoque rerum alienarum et sibi concessarum usu esse contentam." Originally transl. in De Vinck 1966, 241.

terms related to the use of material things were *proprietas* (property or ownership), *possessio* (possession), *ususfructus* (the right of usufruct), and *usus* (the right of use).[9] These four concepts had their origin in Roman law, and Bonaventure refers to three of them. He mentions *proprietas, possessio* and *usufructus*, but he does not speak of the right of use (*usus*). However, the term *usus* makes its appearance in Bonaventure's concept of *simplex usus*, which denotes not the right of use, but the simple factual use of material things.

The term *dominium* is another concept used in jurisprudence. In Roman law the term *dominium* was used as a synonym for *proprietas* in order to signify ownership.[10] Medieval jurisprudence also came to recognize a broader use of the term dominion, which could be associated with any *iura in re*.[11] Bonaventure's usage reflects this development. It is characteristic of Bonaventure's interpretation that he considers dominion to be the opposite or antonym of poverty. From that viewpoint he uses *dominium* as an umbrella concept that signifies or refers to all juridical property titles. Bonaventure's defense of Franciscan poverty rests on a clear or categorical distinction between dominion (including *proprietas, possessio, ususfructus*) and the factual or simple use (*simplex usus*) of things. He builds his argument on a descriptive claim that asserts an indisputable natural fact: the life of mortals necessarily requires the (simple) use of things. If one does not use certain things to a certain extent, then one will cease to exist. And since voluntary death is not an option allowed a human being, one may not totally renounce the use of things. For the converse reason juridical property titles can be renounced: human life is not directly dependent on them. Such reasoning leads Bonaventure to appraise the Franciscan profession guided by the vow of poverty, which "most fittingly calls for renouncement of *dominium* over anything whatsoever."[12]

Bonaventure's argument reveals an important element in the Franciscan position. The Franciscans wanted to remain outside the

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[9] On these terms in Roman law, see e.g. Thomas 1976, 133–150, 202–207, and chapters 4.2 and 4.3. below.

[10] Willoweit 1974, 140.

[11] In the fourteenth century the commentator Bartolus of Saxoferrato explicitly recognized that in the broadest sense, "dominion" could be taken to refer to any property right (*ius in re*). For Bartolus's terminology, see Coing 1953. For a useful survey of medieval applications of the concept of dominion, see Burns 1992, 16–39.

[12] For Bonaventure's use of juridical terminology in detail, see Mäkinen 2001, 57–94.

entire legal system that regulated relationships between men and material things. Nevertheless, they had to have a certain link to the system for, as Bonaventure maintained, a certain use of things is necessary for survival. The Franciscan brothers had to eat and drink, and because they typically lived in cities and other areas where practically everything eatable and drinkable existed within the system of private property rights, the Franciscan profession had to "be content with the limited use of things belonging to others and conceded to it." The Franciscans' *simplex usus* was characterized by using things that belonged to others and conceded to their use by the owners. The important point was that, in giving his things to the Franciscans, the owner did not transfer any of the rights related to these things. From the viewpoint of the law, property relations were left untouched: the owner remained the owner after he had given his things to the Franciscans, and the Franciscans possessed no legal titles or juridical status, although the brothers *de facto* possessed the things they needed for their daily use.

The Franciscans' claims received official recognition when Pope Nicholas III promulgated the bull *Exiit qui seminat* (1279), which settled the dispute for the following four decades. Nicholas's bull sided with the Franciscans: *Exiit qui seminat* declared that there were five distinct and possible relationships to temporal commodities: *proprietas* (ownership), *possessio* (possession), *usufructus* (usufruct), *ius utendi* (right of using), and *simplex usus facti* (simple use of fact). Nicholas's verdict was that the Franciscans could renounce all but the last.[13] Nicholas's terminology was slightly different from Bonaventure's. He made further use of contemporary juridical terminology. Nicholas's list included the right of using, i.e., the particular right that authorizes the person to use another's corporeal thing, which had been missing from Bonaventure's list. Nicholas did not, however, use the Roman title *usus* to signify this right, but rather used the term *ius utendi*. Like Bonaventure before him, Nicholas III reserved the term *usus* for the expression that signifies the simple use that was suitable to the Franciscans. Nicholas's term is *simplex usus facti*, which puts

[13] Nicholas III, *Exiit qui seminat*, 1039–1040: "Nam quum in rebus temporalibus sit considerare praecipuum proprietatem, possessionem, usumfructum, *ius* utendi, et simplicem facti usum, et ultimo tanquam necessario egeat, licet primis carere possit vita mortalium, nulla prorsus potest esse professio, quae a se usum necessariae sustentationis exludat."

further emphasis on the factual nature of the Franciscans' relationship to material things and their use.[14]

1.2. *Godfrey of Fontaines*

Papal recognition did not silence the voices critical of the Franciscan position. Secular masters at the universities continued their polemics. The majority of the arguments could be characterized as consequentialist: they focused on pointing out dubious consequences resulting from the renouncement of all property-related juridical rights.[15] Usually, however, the renouncement of rights *per se* was not criticized as illicit. At the turn of the fourteenth century, however, the secular master Godfrey of Fontaines (c. 1250–1306) launched an original argument against the Franciscans. Godfrey criticized the Franciscan position, which was already accepted as orthodox, by introducing the idea of a natural right of using things into the discourse on apostolic poverty. In *Quodlibet VIII* he claimed that

> Because by natural law each person is obliged to maintain his life, which is not possible without using external goods, therefore, by the right of nature (*iure naturae*), each person has dominion and a certain right (*ius*) in the common exterior goods of this world, a right that he cannot licitly renounce.[16]

Here, Godfrey's account is characterized by a twofold use of the term "right." First, he uses "right" as a synonym for "law," in speaking of the right or law of nature. Second, he associates a "right" with the individual, treating a "right" as equivalent to "dominion." Godfrey notes that the natural law creates an obligation to stay alive, which could not be licitly ignored. The strength of Godfrey's argument resides in the fundamental nature of this obligation. In medieval discussion of the natural law, the dictates concerning self-preservation were commonly

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[14] For the differences in Bonaventure's and Nicholas's terminology, see Brett 1997, 19, and Mäkinen 2001, 96–97.

[15] For the secular masters' critique of the Franciscan position, see Mäkinen 2001, 26–64, 120–162.

[16] Godfrey of Fontaines, *Quodlibet* VIII, q. 11, 105: "…propter hoc quod unusquisque tenetur iure naturae vitam suam sustentare, quod non contingit nisi de bonis exterioribus, ideo etiam iure naturae quilibet habet dominium et quoddam ius in bonis communibus exterioribus huius mundi, cui iuri etiam renuntiare non potest licite." For Godfrey's use of legal terminology in detail, see Mäkinen 2001, 124–139.

considered the most basic.[17] Godfrey states further that this obligation gives rise to a right or dominion with respect to using the things of this world. As the obligation of natural right could not be ignored, neither could this natural right of using things for one's subsistence.

The idea of the natural right of using was not Godfrey's invention, but had been formulated by canon lawyers in the twelfth century. The idea reflected the canonists' doctrine of property, in which property was thought to be both private and common to all. The canon lawyers did not contest the legitimacy of private and exclusive ownership. Yet as far as the use of the things of this world was concerned, they maintained that things should be shared with others in time of need. This was a response to the principle of common possession under the right of nature (*ius naturale*) documented in Gratian's *Decretum* (c. 1150).[18] As a consequence, in an extreme situation where life itself was at stake, every person had a natural right to use things that were owned by someone else.[19] As Godfrey formulates the principle in his *Quodlibet XII*:

> In extreme necessity anyone has the right to use *(ius utendi*) temporal goods as much as it is sufficient for his sustenance. No kind of perfection whatsoever will demand or permit that someone renounces this right and *dominium*.[20]

It is also illuminating to compare Godfrey's account to that presented by Bonaventure, quoted above. While Bonaventure spoke of the use of things that may not be renounced because the life of mortals is not possible without it, Godfrey formulated a similar idea in terms of rights. According to Godfrey, the Franciscans could not renounce all rights and *dominia*, for they could not renounce the natural right or *dominium* of using temporal goods in situations of extreme necessity. The implication was that, according to Godfrey's view, man's

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[17] See e.g. Thomas Aquinas, *Summa theologiae*, 1a2ae, q. 94, a. 2, co.

[18] *Decretum*, D.1 C.7.

[19] See Tierney 1997, 69–76. Tierney thinks highly of the work of the twelfth-century canonists. According to him, "these canonistic arguments about the status and claims of needy persons provide an explicit example of an early natural rights theory." Ibid., 75. For the doctrine and Godfrey's use of it, see also Swanson 1997, 405–417; Mäkinen 2006.

[20] Godfrey of Fontaines, *Quodlibet* XII, q. 19, 143: "…in extrema necessitate quilibet habeat ius utendi bonis temporalibus quantum sufficit ad eius sustentationem. Nec qualisqumque perfectio exigit vel permittit quod aliquis huic iuri et dominio renuntiet."

relationship to material things could not be adequately or exhaustively described by using the distinction between juridical rights and factual use. This was because there is a natural right of using, actual in extreme situations, that is different from the juridical right of using because it is defined and established by natural law.

Godfrey's argument can be read as a calculated attempt to broaden the setting of the Franciscan case into a context in which it would be difficult for the Franciscans to hold to their claim of renouncing of all rights and *dominium*. It is easy to see the potential force of Godfrey's contention. His point was to challenge the legitimacy of the Franciscan ideal in a direct way by claiming that the very act that plays a constitutive part in the Franciscan ideal is illicit as a human activity. Were Godfrey's argument solid, the Franciscan "profession" could not possibly be an (or the) expression of perfect human existence. Illicit actions do not constitute perfection, however we define perfection.[21]

1.3. *Peter John Olivi*

During the thirteenth century a characteristic feature in the debate over Franciscan poverty was that the participants felt an indirect interest in rights. The Franciscan defense promoted this approach by establishing the framework for the entire discussion. Specifically, the Franciscans were interested in articulating their ideal by defining the essence of apostolic poverty. Juridical property rights (*iura in re*) were relevant as being something, or as being representative of something, that was inconsistent with true *paupertas*. The Franciscan writers did not give

[21] Godfrey's argument apparently presumed that the Franciscans' renouncement of *ius* and *dominium* was not merely a definition of the Franciscan profession in strictly juridical language, but also had implications for the natural or moral realm as well. It seems that at least the early Franciscan theorists who were writing in the end of the thirteenth century, worked on the assumption that the Franciscans had completely given up *ius et dominium* in a way that surpassed the strict juridical language of rights. Brett emphasizes how the Franciscan vow of poverty defined the Franciscan brothers' status as human beings. She notes that, for the Franciscans, "outward poverty was only the expression of a more important inward poverty, 'poverty of the spirit'." Brett 1997, 13. By committing himself to Franciscan rule, every *Minor* voluntarily gave away the primary *dominium* of man: *dominium* over one's own will. This act of self-mortification, the renouncement of one's own proper will, was, according to Brett, the fundamental reason why Franciscans did not and could not have legal *dominium*. The Franciscans' legal position was thus rooted in their self-understanding as *Minors*. See Brett 1997, 12–13.

any definition for the term *ius*, but instead used the term to explicate peculiarities of their own form of life.[22]

An interesting example of the use of the term "right" was given by the Franciscan Peter John Olivi (1248–1297) in one of his disputed questions (*questio disputata*), which was later called *Quid ponat ius vel dominium* (c. 1295).[23] Olivi's treatise is an academic work in which Olivi operates with the language of rights, but his main interest is in metaphysics. His inquiry concerns the reality of rights and obligations. At the beginning of his treatise, Olivi remarked that when dealing with matters of justice, we use such words as right (*ius*), jurisdictional power (*potestas*), and authority (*auctoritas*), debt (*debitum*), and obligation (*obligatio*). The main question for Olivi was whether the objects signified by such words have any real existence.[24]

> Namely, whether the king's right of power and authority over his kingdom and over the subjects, or the right of property over one's own house, adds something real to the things or persons to which they belong, and in return, whether a debt by which a slave or subject is obliged to his king or lord or a monk to the abbot, adds something real to the subjects and monks themselves, and so with all similar cases…[25]

Olivi's use of the term "right" draws a parallel between a property right and the king's right of power and authority. He thereby associates the notion of right with a superior position or power. Yet he also uses "right" in a different manner of speaking, namely the right of subjection or obligation (*ius subiectionis vel obligationis*) to a superior as well as the right of debt (*ius debiti*) by which man is obliged to God.[26] The unifying strand behind Olivi's usage of the term "right" is

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[22] Mäkinen has documented the arguments presented in the Franciscan discussion of poverty in the thirteenth century. Her account transmits effectively the prevailing indirect interest in rights. See Mäkinen 2001.

[23] See Doyle 1987.

[24] Olivi, *Quid ponat vel dominium*, 316: "Quoniam, in omni opere et negotio iustitie, nomine iuris seu iurisdictionalis auctoritatis et potestatis ac debiti et obligationis utimur, sitque a quibusdam quesitum sepe an huiusmodi addant realiter aliquid supra subiecta vel extrema quibus attribuuntur…"

[25] Olivi, *Quid ponat vel dominium*, 316: "…utpote an ius regie potestatis et auctoritatis super suum regnum et super subditos vel ius proprietatis super domo propria aliquid realiter addant super res vel personas quarum dicuntur esse, et econtra an debitum quo servi et subditi tenentur suo regi vel dominio vel monachus abbati aliquid reale addant ad ipsos subditos vel monachos, et sic de aliis consimilibus…"

[26] Olivi, *Quid ponat vel dominium*, 317: "…set ius debiti quo tenemur Deo et superioribus nostris…"

his categorization of a right as a relation or habitude. The question is therefore whether these relations, including the right of obligation and the right of authority, have any real existence.[27]

After setting forth a scholarly discussion, Olivi presents his own response. In his judgment, we may conclude with certainty that

> The habitudes mentioned above truly posit something real, but they do not add a separate essence really informing these subjects, of whose and in which they are said to be.[28]

Thus according to Olivi, the language of rights does indeed posit a specific kind of reality. At the same time, Olivi denies the possibility that rights and dominion, political authority and power, are "real" in the physical or essential sense; they do not posit any real accident that could belong to the person who holds the right or obligation.

Aware that his view needed further clarification and justification, Olivi makes an excursion in order to put rights and obligations into a broader context. To make his view plain, he refers to the "order of rational nature towards God and towards the things of this world."[29] What he has in mind is a metaphysical order that defines man's ontological status within creation. Olivi's point is that the existence of human beings is not an isolated event, but a related or ordered mode of being. He points out that rational nature is obligated to God as "the debtor of perfect obedience and reverence." Further, every human being is also obligated to one's fellow men as "the debtor of the virtue of justice and of the unanimous and sincere alliance and friendship." This obligation is not perfect but has its limits: it is obligated to "all that is good or leads back to good." Olivi also points out that "because of the greatness of its intellectuality and liberty," the rational nature has an "order of governance over the irrationals." A relation of governance also exists between men. Olivi says that "because of the supereminence of wisdom and virtue," rational nature has "a certain

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[27] As a relation a right has a subject, who is the right-holder. Furthermore, as a relation a right includes a reference toward something (*ad aliquid*); it cannot be predicated solely upon the subject of the right, but refers outside the right-holder to the object of the right. For Olivi's view of relations, see Schönberger 1994, 143–150.

[28] Olivi, *Quid ponat vel dominium*, 323: "…predicte habitudines vere ponunt aliquid reale, non tamen addunt aliquam diversam essentiam realiter informantem illa subiecta, quorum et in quibus esse dicuntur."

[29] Olivi, *Quid ponat vel dominium*, 323: "Ad cuius evidentiam attendendus est ordo nature rationalis ad Deum et ad res universi."

position of governance over all those persons who are inferior in virtue and wisdom."[30]

Olivi calls this order "the due order" (*debitum ordo*). The due order has its foundation in man's rational nature and in the spiritual gifts of grace that man has received from God. After suggesting all this, Olivi addresses the original question of the degree of reality and offers a solution that carries a strong emphasis of theological voluntarism.

> If one asks, what does this order really posit, the answer is two mutually connected things. The first is the divine willing itself, insofar as it is the willing of a thing and insofar as it encloses the willed thing. The second is the actual entity and essence of the willed thing itself, as far as it is actually existing for the divine willing as its actual object or as the willed. Therefore, if nothing is more real and divine than the divine willing and if second to God nothing is more real and divine than what is actually willed by God and especially when the willed is one who holds and keeps the place of God over others, then it is clear that the order spoken above is most real and divine, although it does not add any separate entity to the things spoken above.[31]

Olivi seems to think that God wills the actuality of real beings as well as the due order that is meant to regulate the relations of human beings to each other and to other creatures. Yet this order of rightful relations "does not add anything to the essence" of the persons and things involved.[32]

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[30] Olivi, *Quid ponat ius vel dominium*, 323: "Est enim natura rationalis ex se et ex omnibus acceptis a Deo debitrix perfecte obedientie et reverentie ad Deum; est etiam debitrix virtutis iustitie et unanimis ac fidelis concordie et amicitie ad omnes personas rationales pro quanto sunt bone aut reducibiles in bonum; rursus, ex altitudine sue intellectualitatis et libertatis habet ordinem presidentie super res irrationabiles, ex supereminentia autem sapientie et virtutis habet gradum cuiusdam presidentie super omnes personas in virtute et sapientia inferiores…"

[31] Olivi, *Quid ponat ius vel dominium*, 323: "Et si queratur quid ponit realiter ordo ille, potest dici quod duo sibi invicem connexa, quorum primum est ipsum velle divinum in quantum est talis voliti et in quantum continet in se illud volitum, secundum est entitas et essentia actualis ipsius voliti prout est actualiter subsistens divino velle tanquam eius actuale obiectum seu volitum. Si igitur nichil est realius et divinius divino velle et si post Deum nichil realius aut divinius quam esse actuale volitum Dei et precipue quando est ad hoc volitum ut actu super alios gerat et teneat vicem Dei, patet quod ordo predictus est quid realissimum et divinissimum, quamvis nichil realiter addat super predicta diversum."

[32] Olivi, *Quid ponat ius vel dominium*, 323: "Prefatum autem debitum seu prefatus ordo non addit aliquam essentiam persone cuius est et super essentia gratiarum illius persone susceptarum a Deo, quia partim ex natura sua, partim ex gratiis nature superadditis habet ordinem predictum et est debitrix eius."

When Olivi then reverts to the rights terminology anew, the main point he is trying to make has already become apparent: rights and dominion, authority and power do not belong to any physical reality. Instead, they are part of "the due order" (*debitus ordo*). If we realize this, "it is easy to see what the right of every superior authority and power and the right of subjection or obligation toward them posit."[33] They posit God's will, both in the sense of God's willing and in the sense of the entities and essences that are willed by God. Within Olivi's position, it is possible to set forth the reality of rights and dominion, obligations and debt, royal authority and power, without the need to postulate corresponding additional entities for this world.

As a corollary to the "rightful order," "the dignity or royal jurisdiction and power" and "dominion or the right of property" enjoy the highest legitimation. According to Olivi, "he who infringes this right is truly said to infringe God's will and law." The offense is the graver "the more completely that is being willed by God and is included in the divine willing."[34] On this point, Olivi is elaborating the traditional Pauline thesis of the divine origin of legitimate authority.[35] Owing to the strong emphasis on theological voluntarism and realism in Olivi's account, it seems that he grants divine legitimation to the actual exercising of authority as well. Not only has God willed the authority, but in addition, when the authority is justly exercising his powers, he is literally realizing God's will.[36]

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[33] Olivi, *Quid ponat ius vel dominium*, 324: "Ex predictis igitur faciliter potest quis advertere quid ponit ius cuiuscumque superioris auctoritatis et potestatis et ius subiectionis vel obligationis ad eam."

[34] Olivi, *Quid ponat ius vel dominium*, 324: "Igitur dignitas aut iurisdictio et potestas regalis ponit realiter duo predicta, et idem est de dominio seu iure proprietatis quod quis habet in domo vel agro; et ex hoc est quod transgrediens hoc ius vere dicitur transgredi Dei voluntatem et legem, et tanto magis quanto id magis est a Deo volitum et in divino velle inclusum."

[35] Accordingly, "there is no authority except God and so whatever authorities exist have been appointed by God" and "anyone who disobeys an authority is rebelling against God's ordinance" (Romans 13:1–2).

[36] Olivi, *Quid ponat ius vel dominium*, 323: "…ulterius, ex ordine quem habet ad Deum ipsum divinum velle, ubicumque illud contuetur, debet habere pro inviolabili lege. Illud ergo quod Deus vult haberi pro superiori et loco Dei et cui tanquam sibi vult aut usque ad certam mensuram aut in omnibus obediri, debet haberi omnino sicut Deus vult." Ibid., 324: "Set ius ipsius iuris principaliter sistit in duobus predictis et in ratione communis iustitie, que prout est absolutissima, abstractissima, est realiter idem quod rectitudo divini velle et divine sapientie, prout vero est concretive in mentibus rationalibus est naturalis vel gratuita rectitudo intellectus et affectus earum,

Olivi's treatise *Quid ponat ius vel dominium* was not directly involved in the controversy over the Franciscan legal position.[37] In an indirect way his account defended the legitimacy of the Franciscans. Olivi argued with emphasis that rights and dominion are real. At the same time, he stressed that the realm of rights is categorically different from natural or physical reality. As such, Olivi's theory justified the nature of the Franciscan *simplex usus* as an activity that belongs to the factual realm and does not involve any rights in use. Olivi's remark concerning power that belongs to the realm of rights gets at the crux of the matter: "royal power or the like, because it is solely a power of right (*potestas iuris*) is not a natural and naturally agent power."[38] This power of right is nevertheless a real power. This is the point Olivi sought to underline, as he emphasized in another chapter:

> In order to understand it even more clearly, it is to be known firstly that royal power or all other similar powers are called powers not because they would originate and impress actions upon a patient in the way that active potencies do, but rather because the king's precept has by order of divine and human will and justice such a force that the men of his kingdom are obliged to be obedient, and because of this we say that the king has the power of promulgating precepts and laws that oblige his subjects in regard to their fulfillment.[39]

The power of right belongs to "the rightful order"; it is called power because of its obliging force and is not power in the sense of physical power. Here, we see the distinction between the realm of rights and the realm of fact, as expressed in terms of power.

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per quam tenent et dicunt hoc vel illud debere fieri aut hoco vel illud esse iustum aut iniustum."

[37] Among the Franciscans, Olivi was inclined to a radical interpretation of Franciscan poverty. See Burr's introduction in Olivi, *De usu paupere*, ix–xxxix.

[38] Olivi, *Quid ponat ius vel dominium*, 329: "…potestas regalis vel consimiles, secundum quod est potestas solius iuris, non aliqua potentia naturalis et naturaliter agens est…"

[39] Olivi, *Quid ponat ius vel dominium*, 329: "Ad cuius pleniorem evidentiam sciendum primo quod potestas regia vel quecumque alia consimilis vocatur potestas non quia ad modum potentiarum activarum ex se influat et imprimat actiones in aliquod patiens, set potius quia ex ordine divine et humane voluntatis et iustitie preceptum datum a rege habet talem vim quod homines sui regni tenentur obedire, et ideo dicimus quod rex habet potestatem edendi precepta et leges obligantes subditos suos ab illa implenda."

1.4. *Hervaeus Natalis*

For the Franciscans, the fundamental question was whether or in what sense material things could be used without having rights in these things (*iura in re*). This question was—naturally—dependent on another question, namely, what is a right? What do we mean by the term *ius* in the context of using material things? As the controversy continued into the fourteenth century, the relevance of this latter question was gradually appreciated and answers were given on both sides of the front line. An example of this stage of the discussion is the anti-Franciscan work *De paupertate Christi et apostolorum* by the Dominican Hervaeus Natalis at the beginning of the 1320s.[40]

Hervaeus Natalis (d. 1323) wrote his treatise at the explicit request of Pope John XXII (1316–1334) to provide advice in the question of whether it is heretical to claim, as the Franciscans claimed, that Christ and his apostles owned nothing in private or in common.[41] In *De paupertate Christi* we encounter language that is typical of the apostolic poverty debate. Hervaeus approaches rights in a Franciscan setting: he places the term *ius* in the context of using privately owned material things and limits his discussion accordingly. Further, he employs the conjunction *ius et dominium*, denoting a close connection between

[40] Hervaeus's treatise is related to an episode that brought up again the question of apostolic poverty and induced Pope John XXII to reopen the Franciscans' case at the hightest official level. In 1321 at Narbonne, a Dominican inquisitor, John of Belna, arrested a Beghard and charged him with teaching a heretical assertion, namely, that Christ and his apostles had not owned anything, either as individuals or in common. During the aftermath the Franciscan leaders stood up for the Beghard brother and defended his assertion, which was, of course, also the cornerstone of the Franciscan interpretation of apostolic poverty. When the case reached Pope John XXII, he consulted a group of chosen experts, which was his usual practice, before delivering his official resolution. Hervaeus Natalis, who was a well-known exponent of Aquinas's philosophical theology and at that time the master-general of the Dominican order as well as a friend of John XXII, was among those consulted. For Hervaeus's role in the debate, see John D. Jones's introduction in: Hervaeus Natalis, *The Poverty of Christ and the Apostles*, 1–19.

[41] The actual phrasing of the pope's question was significant and revealing; it was not only a question of whether the Franciscan interpretation of the apostolic ideal was untrue; it was also about whether it was untrue in a way that might place its adherents under the sanctions of the official Church. For this reason the pope's formal request for advice in this matter was ominous in foreshadowing repressive actions on the Franciscan order. See Tierney 1997, 95, and Sikes's introduction in: Hervaeus Natalis, *De paupertate Christi et apostolorum*, 218–219.

the two terms.[42] What distinguishes *De paupertate Christi* from the writings discussed so far is its more direct and reflective interest in the term *ius*.

In *De paupertate Christi*, Hervaeus Natalis considered two central notions that played a fundamental role in the legal self-understanding of the Franciscans. The first notion was the distinction or dichotomy between the factual realm and the legal realm, which enabled the Franciscans to claim that they renounced all rights over material things and were committed to simple factual use of things. The second notion was the claim that the Franciscan's way of life imitated the life of Christ and his apostles and was therefore exemplary of the perfect way to live a human life. For Hervaeus, these two notions were incompatible.

The starting point for Hervaus's argument was his understanding of the ideal of perfect living. Hervaeus was a declared Thomist, acting as the master general of the Dominican order, and his view of perfect living reflects his Thomistic inclinations. He equates perfect human life with a virtuous moral life, with charity as the principal virtue.[43] The problem with the distinction between factual activity and action by right is that, from the viewpoint of morality, there is no human action that could be categorized as being simply a factual action. For this reason, the distinction between factual action and action by right

[42] Hervaeus's description of the problem under discussion is illustrative in this respect: "Et quia aliqui dicunt quod paupertas perfectissima requirit totalem abdicationem iuris et dominii in rebus exterioribus et etiam abdicationem provisionis in futuro nisi ubi evidens necessitas immineret, ideo circa hoc quaeruntur tria. Primum est utrum ius et dominium in rebus temporalibus possit separari ab usu earum; secundum, utrum habere ius et dominium in rebus temporalibus diminuat de perfectione personali; tertium, utrum facere provisionem pro futuro diminuat de perfectione personali." Hervaeus Natalis, *De paupertate Christi et apostolorum*, 234.

[43] Hervaeus points out that in a perfect mode of human life, it is not a question of natural life, but of moral life, that is, of "all the habits and acts for which we are responsible." Consequently, the perfection of human life essentially consists of virtuous habits and their acts. Hervaeus also remarks that, although all virtues are constitutive of perfect living, they are not equal. The principle virtue is the infused virtue of charity "by which we are inclined to love God above every love of friendship and to love our neighbor for God's sake." Charity is the summary of all virtues: "perfection consists, first and principally, in the habit and act of charity as well as, consequently, in the other virtues and their acts that are joined together in charity." Hervaeus Natalis, *De paupertate Christi et apostolorum*, 225–226. Hervaeus's interest was in personal perfection (*perfectio personae*) instead of the perfection of a state (*perfectio status*). Hervaeus Natalis, *De paupertate Christi et apostolorum*, 247: "…ad perfectionem personae pertinet essentialiter caritas et aliae virtutes et actus earum, sicut illud quod est essentialiter perfectio."

needs to be evaluated in light of the moral distinction between licit and illicit action. This is the basic principle in Hervaeus's argument.

First, Hervaeus defines the legal realm from the moral point of view, by bringing up the question, "what is signified by *dominium, ius* and *proprietas* with respect to temporal things."[44] The answer follows immediately:

> It is to be known that these names *dominium, ius*, and *proprietas* mean the same with respect to a thing. For they mean nothing else but to have power over a thing by which one can licitly use a thing or alienate a thing, and this by donation or by sale or by some other way.[45]

From a moral perspective, dominion, right, and property mean the same thing: "they mean nothing else but to have a power over a thing by which one can licitly use a thing or alienate a thing."[46] Hervaeus recognizes, though, that these three titles have different connotations. He notes that "dominion seems more to signify the power itself, and right seems more to signify the licit circumstances, and property signifies that the thing in which someone has a right, is not someone else's."[47]

In order to elucidate his interpretation of right as a licit power, Hervaeus introduces the conceptual framework to which his definition of right belongs.

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[44] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 235: "…quid importatur per dominium, ius et proprietatem in rebus temporalibus…"

[45] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 235: "…sciendum quod ista nomina, 'dominium', 'ius', et 'proprietas', idem dicunt in re. Nichil enim aliud dicunt quam habere potestatem in aliqua re per quam possit licite re aliqua uti vel rem aliquam alienare, et hoc vel per donationem vel per venditionem vel per quemcumque alium modum."

[46] To have a right, dominion, or property is equal to having the licit power of acting. This is not a definition of 'right' in general or of the concept of a right, but of the juridically understood 'right' in the context of a discussion in which the usage of material things is analyzed from the viewpoint of moral action. My view is that Hervaus's definition of a right as the licit power of acting was determined by the dichotomy between the factual realm and the realm of rights. Licit power and juridical power were identical. Cf. Tierney 1997, 104–108; Kriechbaum 1996, 64–68.

[47] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 235: "…posse iuris sit posse facere licite, et sic patet quod dominium, ius vel proprietas importat potestatem qua aliquis potest licite exercere aliquid circa res venientes in usum humanae vitae, ita quod dominium magis videtur importare ipsum posse, sed ius magis videtur importare circumstantiam liciti; proprietas vero importat rem in qua quis habet ius, non esse alienum ab eo." Hervaeus's analysis is careful and identifies clearly the basic ideas that were associated with these terms in medieval discourse. For the relationship between *dominium* and *proprietas* in medieval legal thought, see Willoweit 1974; Hecker 1990, 27–30.

> It should be known that there are two kinds of power by which someone can act out something with respect to a thing, namely, the power of fact or of execution, as man *de facto* can eat something edible or drink something drinkable, be that his thing or not with respect to use and *dominium*. Another power that pertains to man is that by which he cannot only *de facto* use this thing or alienate it, but also by which he can alienate and use it licitly and as if it were his, and this power we call the power of right.[48]

With this distinction, Hervaeus rephrases—in terms of power—the dichotomy between the realms of fact and of right. On the one hand, he admits that the Franciscan position is indeed possible. It is certainly possible for a human being to use material things simply by exercising factual power. It also goes without saying that material things cannot be used without factual power. On the other hand, Hervaeus's main point, implicit in this quotation, is that if the power of fact is not joined with the power of right, then the use of a thing cannot be licit.[49]

Hervaeus continues by explaining that the power of fact cannot denote licit power, because the power of fact is equally related to licit and to illicit use. This means that from the power of fact alone one cannot infer that the use of things is licit. It might well be illicit. But why is it that the use of things by the power of fact alone is necessarily illicit, as Hervaeus wants to argue? The solution is built into the dichotomy between the realms of fact and right. The power of fact receives its normative connotation indirectly by being the conceptual opposite of the power of right. If the power of right signifies morally licit usage, then its opposite signifies illicit usage. This argument

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[48] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 236: "Unde sciendum quod duplex est potestas qua aliquis potest aliquod agere circa aliquam rem, videlicet potestas facti sive executionis, sicut homo de facto potest comedere aliquid comestibile vel potare aliquid potabile, sive sit suum quantum ad usum et dominium sive non. Aliam vero potestatem convenit homini habere circa rem aliquam qua non solum potest de facto uti illa re vel alienare eam, sed etiam qua potest licite et tamquam suam alienare eam et uti ea, et hanc potestatem vocamus potestatem iuris."

[49] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 249: "…sed usus in quacumque re sine iure in use et uti rebus quae consumuntur ipso usu et usus in rebus sine iure in ipsis rebus est illicitus…Sic ergo patet quod habere temporalia quantum ad ius et dominium, immo ad vivendum licite, necessarium est habere ius in eis et in usu eorum…" Brett has argued that Hervaeus's "strategy is to accept the old Franciscan dichotomies between *dominium* and poverty, and then to argue that absolute poverty is impossible for a human being as a rational creature." Brett 1997, 55. I do not find her interpretation convincing. In Hervaeus's view, absolute poverty was possible, but illicit for a human being.

is explicit and dominant in *De paupertate Christi et apostolorum*. In speaking of fungibles, Hervaeus concludes:

> As was said above that a right in those kind of things, regarding either the use or the very substance of the thing, is nothing other than the power of using these things licitly; it thus follows that the use of these things without rights is illicit.[50]

Hervaeus challenges the Franciscan position with a clear normative claim by assimilating the licit use of things into use by the power of right.[51] It is clear that his argument is incontestable only in the framework of a discussion where it is taken for granted that "man has only two powers towards things that come into use in human life." Of course, this was just the setting for the Franciscan discourse.[52]

1.5. *William Ockham*

The next relevant treatise in the Franciscans' defense was William Ockham's (c. 1285–1347) *Opus nonaginta dierum* (c. 1334). Ockham's book delivered a blow-by-blow refutation of the anti-Franciscan arguments that Pope John XXII had introduced in his bull *Quia vir reprobus* (1328). John had attacked the Franciscan position on a wide front, using a set of separate arguments. From our point of view the most interesting line of argument was the one that John had borrowed

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[50] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 285: "…sicut supradictum est, quod ius in talibus sive quantum ad usum sive quantum ad ipsam substantiam rei nichil aliud sit quam potestas utendi licite talibus, sequitur quod usus talium sine iure est illicitus…"

[51] As Hervaeus later puts it: "…usus facti licitus non potest esse sine aliquo iure." *De paupertate Christi et apostolorum*, 253. Hervaeus maintains, for example that "habere ius in ipso usu est habere potestatem licite utendi aliqua re" and also "habere potestatem licite utendi est habere ius in ipso usu." *De paupertate Christi et apostolorum*, 240. In one sense of the term, *licite* could be taken to refer to action that is lawful in the sense of being established by law (with the distinction of licit vs. non-licit); to adopt this sense would suit the Franciscans by denoting the legally undefined nature of the Franciscan use. This is not, however, the sense of *licite* that Hervaeus had in mind. His interest is not in a descriptive account; it is the essence of virtuous living that provides the framework for his discussion, and in that context the term licit is to be taken in the moral or normative sense, meaning 'not prohibited' or 'licit' (with the distinction of licit vs. illicit).

[52] Hervaeus Natalis, *De paupertate Christi et apostolorum*, 236: "Maior patet quia homo non potest circa aliquam rem habere aliquod posse nisi posse facti absolute vel posse licite. Minor etiam faciliter probatur, quia illud quod est commune licite et illicite utenti non potest dici posse iuris, quia id quod fit de iure, fit licite; sed posse facti est commune licite et illicite utenti, ergo posse facti non est posse iuris, ergo relinquitur quod posse iuris sit posse facere licite…"

from Hervaeus Natalis's *De paupertate Christi et apostolorum*. In *Opus nonaginta dierum* Ockham addresses and refutes John's arguments, but indirectly his account confronts Hervaeus Natalis as his adversary.[53]

In *Opus nonaginta dierum* Ockham bases his account on a set of definitions that he introduces in his chapter 2. The central concept in his argument is the right of using (*ius utendi*), which had been introduced into the discussion on Franciscan poverty by Pope Nicholas III in his principal Franciscan bull *Exiit qui seminat*. In Nicholas's formulation the right of using (*ius utendi*) was contrasted (together with *proprietas, possessio*, and *usufructus*) with *simplex usus facti*.[54] Ockham takes advantage of the appearance of the term *ius utendi* in the papal decree and although Nicholas had not discussed the term with any precision, Ockham gives it a central place in his account. Ockham's interpretation is a specific one. For him, *ius utendi* seems to be the very term corresponding to the notion of a positive legal right in the context of using extrinsic objects. As he explains:

> Therefore, the right of using belongs to him who has *usus nudus* and also to him who has *usufructus* and not only to them, but often belongs to him who has *dominium* and *proprietas*. Whence in the definition of *usus*, the right of using is placed as if it were the genus when it is said: "*usus* is the right of using another's things preserving their substance."[55]

Here, Ockham's reasoning is based on some basic observations concerning the related juridical terminology. In medieval jurisprudence the right of use (*usus*) was understood as a "fraction of usufruct," and as such it was thought to be the most basic or restricted of the juridical rights related to the use of things.[56] Ockham quotes the juridical definition of *usus* in order to show that the "right of using" is included in *usus,* or *usus nudus* as it was also called. He refers to the fact that the similar expression "the right of using," also appeared in the Roman law definition of usufruct, from which the definition of *usus* was derived. Finally, he refers to the owner's right of using his things, which the owner undoubtedly had if he had not transferred the

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[53] See Tierney 1997, 107–108.

[54] See chapter 1.1. above.

[55] Ockham, *Opus nonaginta dierum*, chapter 2, 304: "Ius igitur utendi competit habenti usum nudum et etiam habenti usumfructum, et non solum illis, sed saepe competit habenti dominium et proprietatem; unde et in diffinitione 'usus' ponitur ius utendi tanquam genus cum dicitur: 'Usus est ius utendi rebus alienis, salva rerum substantia'."

[56] See chapter 4.2. below.

usus or *ususfructus* of the things to another person. Ockham is careful not to claim that the owner has the right of use (*usus*) or of usufruct (*ususfructus*), which were defined as rights "of using another's things" and thus were incompatible with ownership.[57]

In chapter 2, Ockham describes the right of using as follows:

> The right of using is a licit power of using an extrinsic object of which no one without culpability on his part should be deprived against his will and without reasonable cause; and if he should be [so] deprived, he can bring an action against the person who deprives him in court.[58]

There are apparent similarities between Ockham's terminology and the terminology that Hervaeus Natalis had used in his description of a right. Ockham agrees with Hervaeus's view that if a person has a juridical *ius in re*, then he has a licit power of using that thing. Unlike Hervaeus, however, Ockham did not intend to assimilate the licit power of using into *ius utendi*. The account that follows the definition of *ius utendi* will demonstrate this clearly.

As we have seen, for Hervaeus Natalis the assimilation of licit power with the power of right rested on the dichotomy between the factual realm and the legal realm. One way to refute Hervaeus's conclusions was to abandon this dichotomy, which had been the cornerstone of the Franciscan position providing the conceptual framework for the analysis of a "right." Ockham's account in *Opus nonaginta dierum* demonstrates this departure. For one thing, Ockham does not make use of the semi-technical term *ius vel dominium*, which had distinguished the earlier discourse and marked the legal realm of rights as different from Franciscan factuality. There are other indications of that departure as well. Immediately after introducing the definition of *ius utendi*, Ockham explains it clause by clause. He points out that in the definition,

> Licit power (*potestas licita*) is put forward to point out the difference from illicit powers by which a thief often uses another's things; and many others also often use their own things by an illicit power.[59]

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[57] Roman law classified *ususfructus* and *usus* as servitudes that were "encumbrances or burdens on ownership or on the thing owned." Nicholas 1962, 141.

[58] Ockham, *Opus nonaginta dierum*, chapter 2, p. 304: "…ius utendi est potestas licita utendi re extrinseca qua quis sine culpa sua et absque causa rationabili privari non debet invitus; et si privatus fuerit, privantem poterit in iudicio convenire."

[59] Ockham, *Opus nonaginta dierum*, chapter 2, 304: "'Potestas licita' ponitur ad differentiam potestatis illicitae qua fur saepe utitur rebus alienis; multi etiam alii frequenter per potestatem illicitam propriis rebus utuntur."

Ockham's examples of illicit power are illuminating. The thief, who has no rights to the things, uses them with illicit power. Hervaeus would have come to the same conclusion. However, Ockham also notes here that the owner may sometimes use his things by an illicit power. This sentence could not fit into Hervaeus's framework of a discussion in which the ownership of a thing necessarily implied the licit power of using that thing. Although Ockham does not explain exactly what he means, the notion of the owner's illicit power of using his own things is fully comprehensible from the moral point of view. It indicates that in Ockham's discussion, the licitness of the power of using is defined in moral norms and not by proprietorship. In this approach the term "power" is understood as "agent power." In a way, this was a novelty that would have been implausible within the older Franciscan paradigm, because the dichotomy between factual power and the power of right implied that the power of agency and the power associated with rights are different types of powers. We may recall Peter John Olivi stressing that the "royal power or the like, because it is solely the power of right (*potestas iuris*) is not a natural and naturally agent power." For Ockham then, the language of rights was a language of moral agency: to have a right meant that one was an agent with a legitimate or licit sphere of action. This was a step further along the road on which an individual right is defined by using power as the generic notion.[60]

In order to remain loyal to the ideal of Franciscan poverty, Ockham needed to find an alternative way to express the characteristics of the Franciscans' relationship to material things. His solution emerges in his explanation of the second clause in the definition of *ius utendi*.

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[60] Ockham's contribution to the discourse on medieval rights has been both hailed and downplayed by his modern interpreters. For a useful summary, see Tierney 1997, 97–103. Among recent interpreters, Tierney does not consider Ockham's usage of 'right' as original. In referring to Hervaeus Natalis, for example, Tierney concludes that "Ockham took over his subjective definition of *ius* from the earlier literature of the poverty dispute or from respectable canonistic sources…" Tierney 1997. 118. Brett on the other hand emphasizes Ockham's originality, which she sees in his philosophy of agency: "*Ius* in Ockham is integrated into a quite different philosophy of agency, one which does not use the dichotomy between nature and spirit and one which therefore need not assimilate *ius* to liberty or to *dominium* in the strong sense." Because of this, Ockham was able to understand *potestas* to mean potency in the Aristotelian sense. Brett 1997, 51–62. For Ockham on rights, see also Mäkinen 2006; McGrade 1980 and 2006.

> "Of which no one without culpability on his part, etc." is also put forward to point out a difference from "grace," because often someone is conceded the licit power of using a thing, of which, however, without all culpability and reason on his part, he can be deprived at the conceder's discretion, solely because the one who made the concession revokes the power conceded. In this way the poor invited by the rich man have the licit power of using food and drink put before them, which, however, the one who invited can take away from them if he wishes, and if he would take them away those who were invited could not on account of this call the one who invited them into court nor would they have any action against him; and such a power is often called grace in the law.[61]

I have quoted Ockham at considerable length because his account illustrates so well the point he is trying to make. In order to make his case, Ockham introduces the idea of using things by the grace of the owner, which was a traditional idea promoted by the Franciscans.[62] By contrasting *ius utendi* with use by grace, Ockham was able to portray the Franciscan position without making reference to the dichotomy between the legal and factual realms. The distinction between "right" and "grace" expresses how Ockham consistently speaks of using things that exist within the system of private ownership and exclusive property rights. It is only when things are owned by someone that the use by grace provides a meaningful contrast to the use by right. Obviously, the poor mentioned in the quotation are meant to signify the voluntary poor: the Franciscan brothers. They have the licit power of using things, which is both conceded by the gracious owner and constantly dependent on the owner's discretion.

Further, it is this second clause ("of which no one, etc.") that imparts to the term *ius utendi* its juridical characteristics. From Ockham's

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[61] Ockham, *Opus nonaginta dierum*, chapter 2, 304: "'Qua quis sine culpa sua', etc., etiam ponitur ad differentiam gratiae, qua saepe alicui conceditur potestas licita utendi re aliqua, qua tamen ad libitum concedentis absque omni culpa sua et causa licite privari potest solummodo quia concedens concessam revocat potestatem. Sic invitati pauperes a divite habent licitam potestatem utendi cibis et potibus positis ante se, quos tamen invitans ad placitum suum poterit amovere, et si amoverit, non poterunt invitati propter hoc invitantem in iudicio convenire, nec aliquam actionem habent contra ipsum; et talis potestas saepe vocatur 'gratia' in iure."

[62] In Roman law the expression *ex gratia* referred to a voluntary action that was based on kindness or grace and not on any legal obligation. It did not create any new obligation, but rather the existing legal obligations were unaffected by actions performed *ex gratia*. It is clear that Ockham had this doctrine in mind here. In Roman law a typical example of *ex gratia* action was a payment within the contract of mandatum. For more on this concept, see Zimmermann 1996, 415–418.

viewpoint *ius utendi* is the licit power of using exterior things that is secured juridically. Consequently, to have *ius utendi* is to have legal status as an agent in the civil legal system. By contrast, the use by grace does not have any legal consequences. The concession made by the owner does not transfer any legal titles or juridical status as an actor in the juridical system. In another chapter, Ockham underlines the juridical characteristics of *ius utendi* by introducing the term *ius agendi*, the right of acting.[63] In his view, the right of acting in the civil court is a distinctive element of *ius utendi* and consequently of all juridical *iura in re*.[64]

The strong emphasis placed on the juridical nature of *ius utendi* might lead one to ask: Is it possible to have a right of using that does not include *ius agendi*? In chapter 61, Ockham suggests this very possibility. As he writes:

> There are two kinds of *ius utendi*. One is the natural right of using, another the positive right of using. The natural right of using is common to all men, because it is had by nature, and not by an additional constitution. However, although every man has this right of using all the time, he does not have this right of using things at all times. Because those who have no things of their own nor in common, although they have the right of using another's things, they do not have the right of using another's things except at times of extreme necessity; at that time by virtue of natural right they can use any present thing without which their lives cannot be sustained, but at other times they cannot use another's things by the authority of this right.[65]

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[63] Ockham did not invent the term *ius agendi*, but it was a legal term that had also been used by John XXII.

[64] Ockham, *Opus nonaginta dierum*, chapter 61, 562: "Secundo isti impugnatores ostendunt quod qui habet ius utendi positivum re determinata, habet ius agendi. Et primo sic: Qui potest repetere suum, habet ius agendi; quia repetitio iudicalis sine iure agendi esse non potest. Sed qui habet ius utendi aliquo, si ablatum fuerit, potest illud repetere…Ergo quicunque habet ius utendi re determinata saltem positivum, habet ius agendi."

[65] Ockham, *Opus nonaginta dierum*, chapter 61, p. 559: "…ius utendi est duplex. Quoddam enim est ius utendi naturale; aliud est ius utendi positivum. Ius utendi naturale commune est omnibus hominibus, quia ex natura, non aliqua constitutione superveniente, habetur. Verumtamen, licet omnis homo habeat omni tempore tale ius utendi, non tamen habet tale ius utendi rebus pro omni tempore. Illi enim, qui nullas res habent proprias neque communes, licet habeant ius utendi rebus alienis, non tamen habent ius utendi rebus alienis nisi pro tempore necessitatis extremae: in quo tempore virtute iuris naturae omni re praesente, sine qua vita eorum salvari non posset, licite uti possunt; alio autem tempore auctoritate illius iuris rebus alienis uti non possunt."

The idea that every human being has a natural right to use another man's property in case of extreme necessity was a common canonistic doctrine.[66] As described earlier, Godfrey of Fontaines had used the idea in an earlier stage of the debate to argue that Franciscans must have rights, for they have a natural right to use things in extreme necessity, which they cannot renounce. Ockham is ready to admit this:

> Nicholas III allowed the *Fratres Minores* to renounce every *proprietas* and *dominium*, but never told them to renounce all and every kind of right. Because it is licit to renounce *proprietas* and the power of appropriating, but it is not licit for anyone to renounce the natural right of using.[67]

Ockham's conclusion is exactly the same Godfrey had reached about the strict dichotomy between a right and a fact.[68] It is uncertain whether Ockham knew Godfrey's argument. What is apparent is that Ockham does not give any specific reasons in support of his view. He does not seem to think that there is any problem in accepting that the Franciscans have a natural right of using another's things in cases of extreme necessity. This can be taken as another indication that Ockham had abandoned the strict dichotomy between the realms of right and fact, which had characterized the earlier discourse. As far as rights are concerned, Ockham's world is not black and white, but colored. The Franciscans had given up property and dominion, but not all rights.[69]

Ockham's conceptual methodology contributed to the dissolution of the inherent connection between right and dominion or the authoritative position that had been one of the prevailing concepts

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[66] See Tierney 1997, 69–76.

[67] Ockham, *Opus nonaginta dierum*, cap. 61, 561: "…Nicholaus III asserit Fratres Minores proprietatem omnium et dominium abdicare, sed nunquam dicit eos omnium omne ius abdicare. Quia proprietati et potestati appropriandi licet renuntiare, sed iuri utendi naturali nulli renuntiare licet…"

[68] See chapter 1.2. above.

[69] Brett has claimed that Ockham was not able to draw a difference betweeen natural and positive *ius utendi*, but treated both as "strictly just in the sense of juridical." According to Brett, this was a major confusion in Ockham's account. See Brett 1997, 64–65. I do not find this interpretation plausible. It was characteristic of Ockham to approach rights from a normative viewpoint in which human action is seen as either licit or illicit. Consequently, any independent sense of "just" is absorbed in "licit" and the juridical significance of an act or a power had to be expressed by using additional qualifying attributes. It is true though that from the normative point of view, which was Ockham's perspective, there is no difference between natural and positive *ius utendi*: both are licit powers to use things.

during the Franciscan controversy. His interpretation of a right as a licit power of agency worked to separate rights from the hierarchical connotations of authority or dominion. Further, Ockham's formulations contributed to the application of the language of natural philosophy to the medieval discourse of rights. One characteristic of writers who became involved with the Franciscan case after Ockham was that they could no longer easily employ the traditional language in which the terms "right" and "dominion" were treated as equivalent. To be more precise, the theorists in question were driven to make a choice: Was individual right a matter of authoritative or superior status or was it a matter of legitimate agency? A good example of this state of the discussion is Richard Fitzralph's work, *De pauperie Salvatoris*.[70]

1.6. *Richard Fitzralph*

Written around 1356, Richard Fitzralph's (c. 1300–1360) *De pauperie Salvatoris* was one of the final major statements in the debate over Franciscan poverty. Although Fitzralph deliberately set out to criticize the Franciscans, his discussion of the case diverged significantly from the paradigm that prevailed in the earlier debate: Fitzralph's approach to rights was not determined by an interest in the use of material things; rather, he approached rights from the perspective of the hierarchical metaphysics of essence. From the theoretical point of view, Fitzralph's major statement lay in the claim that the perfect way of human life, which Fitzralph took to mean life in God's charity, by necessity entailed divine dominion over the rest of creation. Fitzralph's theory of dominion made use of the idea of dominion based on God's gratifying grace, which had been cultivated within the Augustinian order, most notably by Giles of Rome in his *De ecclesiastica potestate*.[71] In Fitzralph's view, God had originally shared his dominion with Adam, but the Fall of Adam had spoiled human nature and dispossessed mankind of divine dominion. Yet the incarnation of

[70] For Fitzralph's role in the Franciscan case, see Walsh 1981, 349–451.

[71] For Giles of Rome's theory, see Dyson's introduction in: Giles of Rome, *Giles of Rome on Ecclesiastical Power*, iv–xxiii. Fitzralph acted as publicist in the Roman curia at Avignon, which can be taken to explain his interest in the theory of dominion based on grace that had been applied to claim the supremacy of the Pope's power in relation to secular authorities. It has been suggested that Fitzralph's theory was influenced by his contemporary Augustinian, William of Cremona. See Walsh 1981, 383–385.

Christ had renewed human nature and original dominion (*dominium originale*), which ever since has been necessarily possessed by all of Christ's true followers.[72] In light of Fitzralph's interpretation of the history of salvation in terms of dominion, the Franciscan way of life, which insisted on the renouncement of all dominion, appeared to be suspect as a religious ideal. To Fitzralph's way of thinking, the renouncement of *dominium* was impossible if one wanted to live in God's charity.[73]

The characteristic feature of Fitzralph's interpretation is that he treats the term *dominium* as a univocal term. Although he recognizes several species of dominion, such as civil, or natural or original dominion, his view is that, in the strict sense dominion means or signifies God's lordship over creation. What makes it possible and plausible to speak of a dominion that is possessed by man comes from the fact that God does not hold back his dominion, but shares it with rational creatures. In book 1 of *De pauperie Salvatoris*, Fitzralph explained that God shares his essence with all things, life with living beings, true senses with sensible creatures, rationality with rational beings. In the same way God shares his dominion to the rational beings. Consequently, the rational being shares God's *dominium* over irrational creation.[74] Originally, God shared his dominion with the first man, Adam.

> So they had *realiter* one dominion by which God dominated Adam and things given to him and by which Adam dominated the same things. Adam did not have this dominion as fully, because he could not possess it as perfectly as God, as neither could he have or possess charity—which is the Holy Spirit—as perfectly.[75]

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[72] Fitzralph, *De pauperie Salvatoris*, lib. II, 335, 344, 348–356.

[73] In addition to this major theoretical point, Fitzralph critized Franciscan poverty with another series of arguments. For these, see Walsh 1981, 377–406. For Fitzralph's doctrine of dominion, see also Betts 1969, 160–175, and Brett 1997, 68–71.

[74] Fitzralph, *De pauperie Salvatoris*, lib. I, cap. XX, 309: "…quoniam sicut Deus rebus omnibus, ut sint nobis modo ad plenum inexcogitabili adherendo aut coherendo eis, communicat suam essenciam, unde esse dicuntur; et suam bonitatem eis communicat, ut bone sint; et suam potenciam, ut potentes sint; et suam pulcritudinem, ut pulcre sint…sic nimirum creature omni viventi suam vitam, immo se vitam, communicat; sencientibus se sensum verum, nunquam falsum, communicat; racionabilibus se racionem communicat…Unde consequitur quod racionabilibus dominantibus ex dono suo ita dominacionem sive dominium suum communicat, ut *domini*, prout dominii sunt capaces, sint atque dicantur."

[75] Fitzralph, *De pauperie Salvatoris*, lib. I, cap. XX, 310: "…ita habebant realiter unum dominium quo Deus dominatus est Ade et rebus sibi donatis, et quo Adam dominatus est rebus eisdem, quod dominium non ita plene habebat Adam, quia nec

Although Fitzralph here admits the real similarity between God's and man's dominion, at the same time he stresses the difference between these two dominions. Despite the fact that God communicated his dominion to Adam, the difference between man's and God's dominion remained, since Adam was not capable of possessing God's dominion as perfectly as God. In the end, this meant—as Fitzralph comments in another chapter—that Adam did not come to possess full dominion, but a dominion of a much inferior kind.[76]

Fitzralph calls Adam's dominion the original dominion, as was customary. He makes explicit reference to the chapter of Genesis in which man came to have *dominium* over other living creatures through God's explicit and verbal concession. Fitzralph also calls man's original *dominium* natural *dominium*. This refers to the fact that man's *dominium* was founded on his rational nature. The same association

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ita perfecte illud capere poterat sicut Deus, sicut nec ita perfecte caritatem que est Spiritus sanctus capere poterat aut habebat."

[76] Fitzralph, *De pauperie Salvatoris*, lib. I, cap. XX, 310: "Hoc ergo modo Deus communicare potuit et communicavit Ade suum dominium, et sua bona pleno iure ab eo optenta capabili sibi modo, sicut Genesis testatur exordium, illi donavit." The relevant chapter was Genesis 1, 25–30; *De pauperie Salvatoris*, lib. II, cap. I, 334: "Quicunque enim rem aliquam dat alteri absolute rei illius dominium non habenti, ille dans dominum efficit donatarium, si ille donatarius sit capax dominii et acceptat: set, quia Deus non poterat suum dominium a se rebus manentibus abdicare, quoniam ipsis manentibus non potest Deus non habere plenum ius seu plenam auctoritatem in ipsas…consequitur hoc secundum dominium longe esse inferioris gradus quam primum." In following the reasoning to its logical conclusion, Fitzralph ends up suggesting that Adam's *dominium* could not truly be *dominium* at all, because that remained with God. More appropriately, Adam's *dominium* made him the borrower (*commoditarius*) of the things of the earth. Fitzralph refers here to the Roman law-based loan contract called *commodatum* in which the ownership of the thing did not transfer to the borrower, unlike in the loan contract called *mutuum*. Ibid.: "…immo, omnino non esse vere dominium, cum non sit nisi respectu rerum, quarum verum dominium et plenum ius seu plena auctoritas residet penes Deum." Ibid., 335: "…sic quod humanum dominium nequaquam verum aut vere dominium dici potest, set quilibet dominus temporalis istarum rerum comparatus Deo et eius dominio usurarius et magis proprie commoditarius, quia ad commodum eius res sibi sunt date…" Fitzralph introduces another aspect that marks a difference between God's and man's *dominium*. By basing his argument on juridical reasoning, he points out that in the case of donation, the recipient becomes the full *dominus* only if the giver abdicates his *dominium*. Fitzralph's point is that when God gave man *dominium* over the inferior creatures, he did not (and could not) abdicate his *dominium*. The abdication would be inconsistent with omnipotence. *De pauperie Salvatoris*, lib. I, cap. VIII, 291: "Si Deus posset quicquam a se alienare, ita quod extunc illius rei careret dominio, non essent omnipotens; quoniam super rem alienatam hoc modo dominativa potestate careret: immo in sic alienando, sicut hominis impotentis, minueretur sua potencia; et eciam, re alienata sibi iterum restituta, augeretur sua potestas: et ex utroque consequitur quod non esset omnipotens."

was also generally made in medieval thought, for example, by Thomas Aquinas. Yet what differentiates Fitzralph's view from that of Aquinas (and many other writers) is the claim that man's rationality was not a sufficient foundation for dominion. In addition man's nature needed to be just. This means that

> *Dominium* does not follow immediately from the specific nature of man, but is mediated by justice, which cannot be had without justifying grace.[77]

Fitzralph's view is that the first man was created in justifying grace, and it was such grace that was the foundation of original *dominium*.[78] This foundational relationship between *dominium* and justifying grace was a necessary relation. Fitzralph emphasizes that possessing *dominium* is involuntary because *dominium* springs from the inspired grace that is present in the soul.[79] Further, *dominium* is inalienable; it cannot be renounced or transferred.[80] Yet dominion can be lost by losing the foundation, and this is exactly what happened to Adam, who lost his *dominium* by the corruption of his just nature.[81] A significant aspect in Fitzralph's view is that after the Fall, original *dominium* was recovered by Christ on his incarnation and now pertains (in a necessary way) to all men who possess saving grace. Original *dominium* is possessed jointly in a similar way by all those who possess it; it is not exclusive

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[77] Fitzralph, *De pauperie Salvatoris*, lib. II, cap. IV, 344: "Istud igitur dominium non sequitur naturam specificam immediate, set mediante iusticia, que sine iustificante gracia non habetur."

[78] Fitzralph, *De pauperie Salvatoris*, lib. II, cap. VI, 344: "Duo igitur habes ostendere: scilicet, quod homo primus in iustificante gracia erat creatus, cuius contrarium Magister Sentenciarum sentire videtur; et quod gracia talis ipsum dominium primo homine, ordine causalitatis seu nature, precessit." This summary is given by the dialogist John, and it is followed by Richard delivering what is required.

[79] Fitzralph, *De pauperie Salvatoris*, lib. III, cap. VII, 390: "Dominium autem nequaquam voluntatem hominis presupponit (iuxta superius iam ostensa), set oritur in anima ad presenciam gracie inspirate."

[80] Fitzralph, *De pauperie Salvatoris*, lib II, cap. XX, 362: "Michi videtur quod istud dominium, quia est originale, non potest ab aliquo, servata iusticia, abdicari; sicut possunt dominia positivis legibus acquisita… Unde istud dominium nec vendi potest nec donari, cum non possit inquemquam transferri: quilibet enim iustus dominium istud habet, et ideo iustus ab alio non potest illud nec empcione nec donacione recipere; nec implius, quia illud non habet, non potest illud vendere aut emendo recipere, cum (iuxta promissa) sine iusticia non sit capax ipsius."

[81] Fitzralph, *De pauperie Salvatoris*, lib. II, cap. XII, 352: "Gracia gratificans non magis necessaria michi videtur ad accipiendum quam ad retinendum illud dominium: immo, minus; cum nemo dominium possit accipere, nisi ad tempus illud retineat, et recepcio ad retencionem naturaliter ordinetur; unde consequitur quod delinquendo dominium perdidit graciam amittendo."

or proper to the right-holder.[82] Nor can original *dominium* be diminished; it can only be limited in act.[83]

Fitzralph clarifies his interpretation by introducing a definition for original dominion:

> It seems possible to state that Adam's dominion was rational creature's mortal right, or original authority, of naturally possessing things that are subject to him by nature, according to reason, and of fully using or exploiting them.[84]

Here, Fitzralph classifies dominion as a right, which was a standard classification in medieval legal thought. To the attribute "mortal" he gives the explanation that man is a mortal creature; therefore, his dominion is a "mortal right." In a way that was customary in medieval legal discourse, Fitzralph understands dominion as a hierarchical relation that a superior being has to an inferior one. Another usual idea is that dominion does not mean arbitrary domination, but dominion regulated by reason.[85]

As far as the concept of *ius* is concerned, Fitzralph's description of original dominion makes an attempt to restore the association of a right with authority in the debate over apostolic poverty. After introducing the definition of original *dominium*, he explicitly raises the question of why he used the term "authority" or right instead of "power." He explains:

> Authority or right falls only to a rational creature; power or faculty belongs to irrationals on their first institution; since, in accordance with the words of Genesis given above, "That they might be to you as food, and to all the animals," the animals of the earth…have in their natural way a congenital and irreprehensible faculty. In addition, right or

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[82] Fitzralph, *De pauperie Salvatoris*, lib. IV, cap. I, 437: "Cum constet omnes iustos equaliter habere originale dominium rerum omnium ab omnibus possessarum, per tale dominium nulla res elongatur a quoquam, nec cuiquam appropinquat."

[83] Fitzralph, *De pauperie Salvatoris*, lib. II, cap. XXIV, 367: "Unde consequitur quod in quolibet viro iusto integrum manet originale dominium, scilicet, quoad omnia sibi subiecta licet quoad usum in aliquibus sit restrictum."

[84] Fitzralph, *De pauperie Salvatoris*, lib. II, cap. I, 335: "Videtur ita posse describi, quod Ade dominium fuit racionalis creature mortale ius sive auctoritas originalis possidendi naturaliter res sibi natura subiectas conformiter racioni, et eis plene utendi sive eas tractandi."

[85] Fitzralph's description of natural dominion is traditional, and as such, it conveniently expresses the fact that his main point concerning dominion was related to the foundation of dominion and not to its content. Cf. Aquinas's description of man's natural dominion in his *Summa theologiae*, 2a2ae, q. 66, a. 1, co.

> authority seems only to concern that which is not against reason, but this does not seem to be true of power.[86]

Here, Fitzralph is clearly inclined to interpret the terms "faculty" and "power" in the sense they were understood in the language of natural philosophy. "Power" and "faculty" lack normative connotations and can be applied in describing animal activity. As such, "power or faculty" do not connote the authoritative status of righteous rationality, which in Fitzralph's view is in the essence of dominion.[87] When a right is treated as a form of authority, this captures the difference that exists between man's rights and animals' powers. In Fitzralph's view, rational human beings in their original righteous nature are superior beings whose similitude to God makes them capable of having right or authority. The position of the animal is to be at the other end of the hierarchical relation, under human dominion.

Fitzralph's interpretation of political or civil dominion is conditioned by his univocal interpretation of dominion. In speaking of civil *dominium*, he points out that in the pure sense of the term, "no one is *dominus* of things unless he is made righteous by the justifying grace."[88]

> Civil dominion, as the original dominion (without doubt) is given by God to men on the condition that the person to whom it is given renders to God his due service. Therefore, when a person sins mortally, and by this, by losing and forfeiting original dominion, he equally and by the same reason forfeits the civil dominion.[89]

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[86] Fitzralph, *De pauperie Salvatoris*, lib. II, 338: "Auctoritas seu ius soli racionali convenit creature; potestas sive facultas irracionabilibus competit ex sua institucione primaria; quoniam iuxta supra posita verba de Genese, *Ut sint vobis in escam, et cunctis animantibus*, animalia terre…suo naturali modo habent congenitum irreprehensibilem facultatem: preter hoc quod ius sive auctoritas solum esse videtur respectu illius quod non obviat racione; non ita de potestate videtur…"

[87] The terminological confrontation between "power" and "authority" had a place in medieval political discourse as related to papalist ideology. The pope possessed *auctoritas* whereas the earthly rulers could claim only to have *potestas*. On papalist ideology, see e.g. Wilks 1963, 254–287.

[88] Fitzralph, *De pauperie Salvatoris*, lib. IV, cap. III, 441: "…quoniam secundum purum sensum huius verbi *dominus* (ut supra probavimus) dominus rerum non est aliquis nisi gracia iustificante sit iustus…"

[89] Fitzralph, *De pauperie Salvatoris*, lib. IV, cap. IV, 441: "Civile dominium, sicut originale dominium, (non dubium) datum est a Deo hominibus pro prestando debito Deo obsequio ab eo cui est datum; igitur, cum quis peccat mortaliter, per hoc perdens ac forefaciens originale dominium, pariter et pari ratione forefacit civile dominium."

Thus, although Fitzralph does not deny the existence of civil dominion, he denies its independence from divine dominion.[90] Yet on this point his view lacks coherence. Contrary to what might be expected, he does not seem to suggest that sin destroys civil legality and legal rights altogether. In speaking of hereditary right he maintains that if the civil heir is a sinner then some righteous stranger, for example, from India, has more right and a better right to the inheritance than the actual heir.[91] Inheritance does not confer dominion on the heir.[92] It does, however, confer on the heir an inferior title to obtaining the inheritance.

> As dominion follows from the reformed image [of God], so from the plain image of God, which is present in mortal man, follows a natural title or condition inferior to dominion… Therefore, inasmuch as the sons can or should have—according to some particular just law—their father's inheritance, to that much they have a right—and consequently a title, namely a sign or cause—in the very inheritance. And if they have this right according to several just laws, then they have as many rights and titles to having or holding the inheritance of their father. However, they do not by any means have dominion or dominions [which is had] by similitude through charity or grace.[93]

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[90] Fitzralph describes civil *dominium* as follows: "Omnium dominorum adventiciorum generalis descriptio patet esse racionalis creature mortalis ius sive radicalis auctoritas acquisita civiliter possidendi res illi lege positiva subiectas et eis plene utendi conformiter rationi." *De pauperie Salvatoris*, lib. IV, cap. IV, 440. In another chapter Fitzralph says that human laws do not authorize except by accident. *De pauperie Salvatoris*, lib. IV, cap. IX, 448: "Lex non prebet auctoritatem seu causam aut possessionem nisi per accidens…"

[91] Fitzralph, *De pauperie Salvatoris*, lib. IV, cap. IV, 441: "Originale dominium in his rebus, sicut in aliis, ius pocius est atque preclarius quam aliquod civile dominium; hoc enim habes supra probatum. Iohannes vero in India graciam optinens habet originale harum rerum dominium, quo caret tuus Robertus habens solum (secundum te) civile dominium in hiis rebus: igitur Iohannes iustus existens in India ius pocius habet in eis atque preclarius quam tuus dominus impius fictus Robertus existens in patria…" Here Fitzralph is using the term civil *dominium* improperly by speaking of the civil *dominium* possesed by a sinner. However, he clearly points out that this is not his own, but his partner dialogist's way of using the term.

[92] Fitzralph, *De pauperie Salvatoris*, lib. IV, cap. IV, 442: "Primum tamen (scilicet dominium) ex hereditate minus provide intulisti; quoniam, etsi sufficit iusta leges humanas filio sine gracia quod sit primogenitus legitimus patris sui, cum condicionibus in lege adiectis, ad hoc ut sit heres ipsius, non tamen ad hoc quod sit hereditatis eius dominus (ut iam dixi), quoniam sine hoc quod sit Deo acceptus bonorum Dei nequaquam dominus potest veraciter appellari aut esse."

[93] Fitzralph, *De pauperie Salvatoris*, lib. IV, cap X, 451: "…sicut dominium sequitur ymaginem reformatam, ita nudam Dei ymaginem in homine mortali sequitur aliquis titulus seu condicio naturalis minor dominio…Quamdiu igitur ex lege aliqua iusta

Here, Fitzralph argues for double legality with a distinction between God's legal order and man-made legal order. God's justice is superior; human law, inferior. Human laws cannot concede dominion to the sinner because dominion is communicated solely by God, and only to those who have similitude to God through being in the state of grace. However, in Fitzralph's view the man-made legal order is not without a (fundamentally religious) legitimation. There is a plain image of God even in the sinner; for this reason the sinner may come to possess a title that is inferior to dominion, but which at the same time provides justification for the man-made legal order. In recognizing this double legality, Fitzralph managed to refrain from drawing practical directives from his doctrine of dominion based on grace. He did not dispute the sinner's ownership of his material property. Although his argument was clearly normative it seems to be more concerned with the way we use the term "dominion" rather than the way we should arrange (or re-arrange) our property relations and government.

1.7. *Jean Gerson*

Fitzralph's conclusions concerning "dominion" and "right" were taken up and refuted by the French theologian and conciliarist Jean Gerson (1363–1429).[94] Gerson was a theorist who did not have any connection to the debate over Franciscan poverty and whose discussion addressed rights on a more general or conceptual level. In the present inquiry, Gerson deserves special attention because his works served as an immediate source for Conrad Summenhart. From the standpoint of Summenhart's thinking on rights, Gerson was a writer of the greatest influence. It could be said that Summenhart wrote his theory of rights using language that was created by Jean Gerson.

In *De vita spirituali animae* (1402), lectio 3, Gerson developed a theory of dominion that was motivated by his wish to take a stand

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possent aut debent filii hereditatem paternam habere, tamdiu habent ius et per consequens titulum, scilicet, signum et causam in ipsa hereditate paterna; et si ex pluribus legibus iustis id habent, iura tot habent ac titulos ad hereditatem paternam habendam sive tenendam: dominium tamen sive dominia similitudine per caritatem seu graciam omnino non habent."

[94] For different views on the origin of Gerson's language of rights, cf. Brett 1997, 82–87, and Tierney 1989, 624–625. For the historical context of Gerson's writings, see Pascoe 1973; Posthumus Meyjes 1999; McGuire 2005.

against Richard Fitzralph's theory of dominion. Gerson accepted Fitzralph's basic idea that man has no *dominium* except that which is given to him by God. Gerson also suggested that there is a real similarity between God's and man's dominion in the sense that "in his gifts, God is said to give himself to the creatures."[95] Yet Gerson rejected Fitzralph's interpretation, which took the ontological state of grace as the necessary foundation for the dominion possessed by man. Gerson based his theory on the idea of man's existence, which can be described in terms of four different ontological states or natures: the instituted, the destituted, the restituted, and the glorified. Gerson's main point is that in each of these states there is a fundamentally God-given *dominium* characteristic of that ontological state.[96]

According to Gerson, in the state of man's original nature God donated himself to man in the gifts of the integral nature.[97] To these gifts belonged original justice. Gerson explicitly does not take a stand on the question of whether original justice belonged to man's nature directly or was something additional to it.[98] Yet he calls the dominion that is founded on original justice natural dominion.

> Therefore, natural dominion is God's gift, by which the rational creature has a right, directly from God, to take other inferior things for his use and conservation; is able to belong equally to several, and is inalienable, when original justice or natural integrity is preserved.[99]

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[95] Gerson, *De vita spirituali animae*, lectio 3, 28: "Deus vero in donis suis donare se dicitur creaturis."

[96] Gerson, *De vita spirituali animae*, lectio 3, 28: "Nihilominus quia nonnulli materiam hanc tractantes, nominatim Dominus Armacanus accipere videntur Dominium, divinum vel Evangelicum & etiam naturale strictius quam supra scripsimus. Nos ad intellectum suae positionis & elucidationem clariorem praemissorum notemus, quod sicut *non est potestas nisi a Deo* (dicente Apostolo, Rom. xiii. 1.) sic potestas quaelibet dicitur donum Dei; Deus vero in donis suis donare se dicitur creaturis… His praesuppositis advertamus deinceps Deum se donare creaturis multipliciter; nominatim quadrupliciter, scilicet pro statu naturae, 1. Institutae, 2. Destitutae, 3. Restitutae, & 4. Glorificatae." This four-member classification of man's nature had been set forth earlier in medieval thought, for example, by Bonaventure.

[97] Gerson, *De vita spirituali animae*, lectio 3, 29: "Primo modo dat se in donis naturae integrae, in eis praeterea quae naturam illam ut talis est consequuntur, quemadmodum est originalis justitiae donum in homine secundum opinionem bene probabilem: non enim videtur possibile quod natura humana integra sit a justitia originali, quae dicitur integritas & obedientia animae virium inferiorum ad superiores, destituta."

[98] Gerson, *De vita spirituali animae*, lectio 3, 29: "Et ita titulus Dominii naturalis fundamentum habet in hac originali Justitia, sive illa dicatur donum aliquod gratuitum superadditum naturae, sive sit natura ipsa, connotando rectitudinem quae dicta est."

[99] Gerson, *De vita spirituali animae*, lectio 3, 29: "Erit igitur naturale Dominium donum Dei quo creatura jus habet immediate a Deo assumere res alias inferiores in

In this description, Gerson appears to be seeking common ground with Fitzralph, who had described original dominion using similar characteristics. Gerson also clarifies civil and the evangelical dominions with corresponding definitions, which conveniently indicates his effort to view "dominion" from the theological viewpoint introduced by Fitzralph.

According to Gerson, this natural or original dominion was exemplified by Adam's dominion over the fish of the sea and the birds of the air, as well as of his eating from all the trees in Paradise, excluding the tree of knowledge of good and evil. Against Fitzralph's interpretation Gerson explicitly emphasizes that this natural dominion was not necessarily based on charity. As a parallel example of natural dominion, Gerson suggests the dominion of liberty (*dominium libertatis*), by which he means a faculty of action that (together with the rational soul) enables man to act in a goal-oriented way in order to attain eternal bliss. It is characteristic of this faculty that it is free, and by freedom Gerson—with Augustinian emphasis—means freedom from sin and the liberty to do good.[100]

In contrast to Fitzralph's position, Gerson maintains that although the Fall of Adam destroyed original justice and original dominion, it did not destroy man's nature altogether. He explains that in the state of destituted nature, God donates Himself to the rational creature in

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sui usum & conservationem, pluribus competens ex aequo & inabdicabile, servata originali Justitia seu integritate naturali."

[100] Gerson, *De vita spirituali animae*, lectio 3, 29: "Hoc modo habuit Adam Dominium super volucres coeli et pisces maris, & ad comedendum de omni ligno quod erat in Paradiso, secluso ligno scientiae boni & mali, hinc appellata est haec potestas hereditas sua. Ex quibus mox infertur quod Dominium originale non erat necessario in charitate fundatum . . . Ad hoc Dominium spectare potest Dominium libertatis, quae est facultas quaedam libere resultans ex dono Dei liberaliter se donante ad agendum vel non agendum cum anima rationali in productioni suorum actuum elicitorum, vel eorum suspensione ad finem beatissimae fruitionis obtinendum: & hoc Dominium tanto liberius est & latius, quanto minus potest in malum, & quanto per bonos habitus est ad bonum vel bono stabilitum." Gerson defines the dominion of liberty as a "faculty freely resulting from a gift of God, freely donating itself, to acting or to not acting, together with the rational soul, in the production of its eliciting acts or in the suspension of them for obtaining the end of beatific enjoyment." In an Augustinian tone, Gerson emphasizes that this dominion is freer and greater the less one is capable of evil. The genitive form "dominion of liberty" should not be read, as Tierney does, to signify that man own's his liberty. The point is rather that man's liberty consists of this kind of dominion. Cf. Tierney 2006, 183. The dominion of liberty seems to be another borrowing from Bonaventure. See Bonaventure, *Lib. II Sententiarum*, dist. 7, part 1, a. 2, q. 3, 187.

natural gifts, which are not gratifying, but which nevertheless demonstrate the continuity of natural dominion. "No one is that much of a sinner for not having some dominion, which can be called natural or gratuitously given; one at least has the dominion of liberty, actually or habitually."[101] Further, Gerson maintains that these natural gifts can serve as the foundation for another dominium, which he characterizes as a gratuitously given "right or faculty to another."[102] Gerson thereby refers to political or civil dominion.

> Whence civil dominion or political (which is more often spoken of) is described as follows: it is dominion introduced because of sin, not able to belong equally to several, is retainable and alienable, when charity is preserved. For it is alienated by selling, donating, neglecting, and exchanging.[103]

In Gerson's view, civil or political dominion is characteristic of the destituted nature of man, for it was "introduced by reason of sin." He explains that owing to sin and its violent consequences, peaceful human life and justice could not exist among mankind after the Fall. Therefore, God gave ruling and coercive power to mankind for the purpose of hindering the wickedness of evilly-disposed men.[104] This

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[101] Gerson, *De vita spirituali animae*, lectio 3, 29: "Secundo modo dicimus Deum donare se creaturae rationali, pro statu naturae corruptae in donis quibusdam seu naturalibus seu gratuitis, non tamen gratum facientibus, & in eis quae inde sequuntur: cum enim natura nunquam sit ita destituta, quin ea permanente Deus se det eidem plus aut minus: nullus erit ita peccator, quin habeat aliquod Dominium quod dici poterit naturale vel gratuitum gratis datum, habet saltem Dominium libertatis in actu vel habitu."

[102] Gerson explains that "in this sense, there are among infidels and sinners the most justified dominions, of the lords towards servants, of fathers toward sons, of men toward women, and of all persons generally toward their inheritances and civil possessions, according to human laws." Gerson, *De vita spirituali animae*, lectio 3, 29: "Erit igitur Dominium tale gratis datum Jus seu facultas in alterum, consequens seu resultans ex dono aliquo naturali vel gratuito gratis dato. Isto modo sunt apud infideles & peccatores justissima Dominia Dominorum ad servos, Patrum ad Filios, Virorum ad Uxores, & omnium generaliter ad suas hereditates & civiles possessiones secundum Leges humanitus institutas."

[103] Gerson, *De vita spirituali animae*, lectio 3, 30: "Unde civile Dominium seu politicum (quia de illo usitatior est sermo) sic describitur; quod est Dominium occasione peccati introductum non competens pluribus ex aequo, retinibile & abdicabile, servata charitate. Abdicatur autem vendendo, donando, negligendo, permutando."

[104] Gerson, *De vita spirituali animae*, lectio 3, 29: "Exempli gratia, praesupposito peccato & violentiis inde sequentibus, necesse fuit alios aliis praeferri, ut homines quiete viverent, & suum unicuique jus tribueretur, quod fieri non potuit si non arceretur improbitas malignorum. Donavit igitur Deus aliquibus potestatem hanc super alios regitivam atque coarctivam seu per se immediate, seu per medium aliorum sub

dominion introduced not only political authority, but also exclusive property relations with alienable rights. In contrast to Fitzralph, Gerson points out that civil dominion could be possessed, regardless of the infused virtue of divine charity.

The restitution of man's nature by Christ gave rise to another kind of dominion: evangelical dominion. Gerson explains that in the state of restituted nature, God gave Himself to man in the gift of charity or gratifying grace. A filial adoption thereby took place, which gave man the hereditary right to possess all of God's goods. Gerson warns that juridical language should not be taken literally as being associated with the dominion of grace. He makes use of biblical narrative, referring, for example, to the paradox of "having nothing and possessing everything," which makes it apparent that the dominion of charity is different in kind from civil dominion.[105] Gerson characterizes the dominion of charity as follows:

> This dominion, which many call evangelical, is described as follows: it is dominion, introduced directly by God, capable of existing simultaneously and equally in many lords, inalienable when charity is preserved.[106]

The purpose of this description is to contrast evangelical dominion with civil dominion. Gerson's explication of this comparison will be discussed below. A point worth noting is that in Gerson's theory, this dominion of charity did not count as restitution of original dominion as it did in Fitzralph's theory. For Gerson, original dominion was dependent on original justice, which indicated that the existence of original dominion was confined to the circumstances that prevailed before the Fall.

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aliquo signo cognoscibile, quale est electio, aut quale est hereditaria successio, aut quale est voluntaria ad eum subjectio, aut quale est quandoque prudentia magna potentiaque civilis super alios idiotas, aut quale est habitudo Patris ad filium, Viri ad Uxorem, sapientis ad stultum & similium."

[105] Gerson, *De vita spirituali animae*, lectio 3, 30: "Deinde tertio modo dat se Deus in dono charitatis seu gratiae gratum facientis, que propria & vera dicitur donatio; quoniam fit per eam adoptio filialis, jus praebens haereditarium ad omnia bona Dei possidenda, quemadmodum dicit Apostolus pluries: Omnia nostra esse, omnia nobis data esse abunde ad fruendum, quod praeterea sumus *quasi nihil habentes et omnia possidentes*, 2 Cor. vi, 10.... Transfert vero multoties sacra Scriptura sub tropis metaphoricis Dominium civile cum suis attinentiis ad hoc Dominium charitatis..."

[106] Gerson, *De vita spirituali animae*, lectio 3, 30: "Describitur autem istud Dominium quod appellatur a multis Evangelicum, quod est Dominium immediate a Deo institutum, compatiens secum ex aequo quotlibet Dominos & inabdicabile, servata charitate."

In speaking of the state of glorified nature, Gerson explains that God gives himself to glorified man in many excellent ways. For example, God gave himself to Christ's humanity "by *unio hypostatica* and the plenitude of all grace." This made Christ the head of the church and "the emperor who judges and governs all." Further, God gave to the Virgin Mary maternal authority in the sense that, by *communicatio idiomatum*, she came to have rights vis-à-vis God, as if God were subject to her as a son is to his mother. As far as the blessed in general are concerned, Gerson makes reference to the four properties of the resurrected body (impassibility, brightness, agility, and subtlety), which in medieval theology were recognized as the transcendent endowments that a saint received from Christ. Gerson describes the saints as having amazing powers; for example, "nothing resists the agility of their bodies, and nothing opposing their vision escapes notice."[107]

After outlining this four-species classification of dominion, Gerson makes a further effort to clarify the differences between the two species that are relevant for man's present existence, evangelical and civil dominion. The basic difference is the independence of civil dominion from divine charity. Gerson maintains that the civil or political does not presuppose charity as its foundation, nor does the just exercise of civil dominion presuppose charity. He also suggests that morally good action is possible without charity, because to exercise civil dominion justly is to act in a morally good way.[108]

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[107] Gerson, *De vita spirituali animae*, lectio 3, 30: "Postremo sunt aliae donationes Dei non ita ad praesens propositum, & hoc pro statu naturae glorificatae & confirmatae, secundum diversos excellendi modos, ut Deus se dedit humanitati Christi per unionem hypostaticam & plenitudinem omnis gratiae tanquam capiti in membra influenti quidquid habuit vitae spiritualis, & tanquam Imperatori omnia judicanti & regenti. Dedit insuper Virgini Beatae auctoritatem maternalem ut dicatur habere Jus maternale in Deum per communicationem idiomatum, quasi Deus sit subditus ei sicut filius Matri. Nec dubium est quin multae conditiones praeclare & potestative consequantur ad has donationes mirabiles supra ceteras creaturas quas omnes nequaquam cognoscimus etiam longe ultra ceteros Beatos; quorum tamen in corpore glorificato & anima admirabiles dotes erunt & stupendae potestates, ut quod agilitati corporum nihil resisted, nihil obstabit quod eorum visum latebit, quod erunt quasi specula & libri lucidissimarum inscriptionum libere se se praesentantes & similia."

[108] Gerson, *De vita spirituali animae*, lectio 3, 32: "Atvero quoniam altercantur multi an Civile et generaliter omne Dominium praesupponat pro fundamento Charitatem: notandum est… quod Dominium Civile et Politicum non praesupponunt ut insit juste alicui per titulum Charitatis… Et breviter ista eadem est penitus difficultas & similiter enodanda, qualis est illa, an absque Charitate potest aliquis bene moraliter operari, nam & juste dominari civiliter morale est."

Apart from this, he points out three differences between the evangelical and the civil dominions, which derive the descriptions above. The first difference concerns the institution of these dominions. Gerson points out that evangelical dominion was "instituted directly by God" unlike civil dominion, which "was established by human invention and for the public utility." Further, evangelical dominion does not presuppose sin, whereas civil dominion presupposes sin; if man had remained in his pristine nature, there would have been no need for compulsive political or civil authority.[109]

Another point of difference concerns the inclusive nature of the relation of dominion. Gerson notes that evangelical dominion "belongs in an equal way to every lord", and "without diminishing." This was due to the spiritual nature of the dominion of charity. Again in contrast, civil dominion does not belong equally to several, but is exclusive in nature. Gerson explains that this is because of its materiality and also because the nature of civil dominion is characterized by "a kind of avaricious appropriation that seeks its own." For example when the king and his vassal have civil dominion over the same possession, they do not have it "equally, not by equal right, not by similar plenitude of civil power."[110]

Still another point of difference between evangelical and civil dominions can be expressed in terms of the foundation of dominion. Gerson states that evangelical dominion is "inalienable when charity is preserved." This is because "the dominion of charity is nothing other

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[109] Gerson, *De vita spirituali animae*, lectio 3, 31: "Ex quorum descriptionibus tres differentias elicimus inter Dominium Civile & Evangelicum hoc modo sumptum.…Itaque Dominium Civile institutum est occasione peccati originalis & aliorum inde consequentium, quibus non exstantibus Dominium tale defuisset: Dominium vero Charitatis non praesupponit peccata, sed est immediate a Deo derivatum sicut ipsa Charitas: Civile autem magis humana adinventione & utilitatis publicae respectu statutum est; nimirum propterea si radicem infectam habens illius saporem contrahit, & si vix exercetur & tenetur absque contaminatione per aliquod delictorum: radix vero Dominii Evangelici est *Charitas quae patiens est, benigna est*, & c. 1 Cor. xiii, 4."

[110] Gerson, *De vita spirituali animae*, lectio 3, 32: "Secundam differentiam invenimus, quoniam Dominium Charitatis (quia non quaerit quae sua sunt) potest ex equo competere quotlibet Dominis propter sui spiritualitatem absque sui diminutione, quemadmodum Deus suum Dominium communicat Angelis & hominibus nec inde minoratur. Sed Dominium civile tum propter sui materialitatem, ut sic dicamus, tum propter appropriationem quodammodo avaram & quaerentem quae sua sunt, nequit ex aequo pluribus convenire: nam quamvis eveniret quod habeant Dominium civile Rex & vasallus vel Burgensis super eandem hereditatem; hoc tamen non est ex aequo, neque eodem Jure, neque simili plenitudine civilis potestatis."

than God's filial adoption or something leading to this adoption, and therefore it cannot be abdicated as charity cannot be rejected justly." By contrast, civil dominion is defined as "retainable or abdicable when charity is preserved." Gerson's point is that civil dominion is not founded on charity, although the state of charity is no obstacle to possessing civil dominion. Further, he stresses that the nature of civil dominion is to be retainable or abdicable. According to him, civil dominion was made so that "everyone could alienate or sell or commute one's possessions" and seek legal protection for one's property.[111]

Just as Gerson's theory of *dominium* in *De vita spirituali animae* takes an explicit stand against Fitzralph's conclusions, his theory of *ius* does the same thing implicitly, but with similar determination. As far as the concept of "right" is concerned, there is a conscious continuity in Gerson's interpretations throughout his literary career. In *De vita spirituali animae* (1402) Gerson sets forth the following description or definition:

> Right is a proximate faculty or power appropriate to someone according to the dictate of right reason.[112]

This definition is very similar to one that he introduced in his later work *De potestate ecclesiastica*, written during the height of the conciliarist movement of 1416–17.

> Right is a proximate power or faculty appropriate to someone according to the dictate of primary justice. Henceforth, this dictate is called law, because law is the rule that is in conformity with the dictate of right reason, and the dictate of right reason and primary justice pertain in God as synonyms.[113]

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[111] Gerson, *De vita spirituali animae*, lectio 3, 32: "Postremo distinctionem tertiam habent, quia civile est retinibile vel abdicabile, servata charitate; non sic Evangelicum; unde quia civile politicis Legibus innititur & institutionibus, ut quod quidlibet rem suam possit alienare vel vendere vel commutare, eam insuper defendere judicialiter atque repetere, aut modis aliis conservare; & talia agere magnam saepe habet sollicitudinem annexam; propterea Dominium hoc sollicitum est anxium et poenale, & potest abdicari a se; potest nihilominus juste retineri & exerceri, etiam extra charitatem, secundum mox dicenda: Charitas vero Dominium quis abdicare, aut vellet aut juste posset, quoniam illud nihil aliud est quam filialis adoptio Dei, vel aliquid consequens ad illam; idcirco jure nequit abdicari, sicut nec Charitas repudiari juste posset."

[112] Gerson, *De vita spirituali animae*, lectio 3, 26: "Jus est facultas seu potestas propinqua conveniens alicui secundum dictamen rectae rationis."

[113] Gerson, *De potestate ecclesiastica*, consideratio 13, 250: "Ius est potestas, seu facultas propinqua conveniens alicui secundum dictamen primae Justitiae. Porro dictamen hoc, Lex dicitur, quia Lex est Regula conformitatem habens ad dictamen

Although Gerson here replaces "the dictate of right reason" with "the dictate of primary justice," he explains that ultimately these are the same and can be assimilated into the concept of law. What justifies this conceptual arrangement is the framework of theological metaphysics that conditions Gerson's account of *ius*. Ultimately, every right, as dominion, is derived from God.[114]

Gerson's definition of *ius* can be read as a response to Richard Fitzralph, who had connected "right" with "authority" and explicitly contrasted "right" with "faculty or power." Fitzralph had pointed out two reasons for preferring the term "authority" instead of "power." Power lacked the connotation of rationality and could be used to signify powers possessed by irrational creatures. Moreover, the term power did connotate rectitude. Although Gerson does not specifically address Fitzralph on this issue, his explanation of the definition of a right in *De vita spirituali animae* adopts a view of both of these critical remarks.

When in *De vita spirituali animae* Gerson elaborates on what he means by right reason, he makes two specifications. First, he points out that if we speak of the essential right reason or of the origin of right reason, then that is something we find only in God. The origin of all right reason is in God's reason and will. God's right reason is the essential right reason. According to Gerson, it is irrelevant for the subject matter whether "right reason and its dictate" are exactly the same as God's will. Further, Gerson maintains that it is most convenient and most Catholic not to take God's will or God's reason as superior.[115]

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rectae rationis: dictamen vero rectae rationis & primae Justitiae conveniunt in Deo synonime."

[114] The expression *prima justicia* could be translated as "first justice." This would have been a better translation if the intention were to make a difference between God's first justice and second justice. Here, Gerson is speaking of *prima justitia* as the primary justice from which all justice is derived. For the rationale for Gerson's description of a right, see also Tierney 1997, 210–211; Brett 1997, 81–85.

[115] Gerson, *De vita spirituali animae*, lectio 3, 26: "Recta ratio & dictamen suum, est primo originaliter & essentialiter in Deo, & an sit idem omnino quod voluntas ejus, remitto ad difficultatem de formalitatibus, & ad Braduardinum in Summa: constat quod in praxibus moralibus recta ratio non est prior voluntate, ut, non ideo Deus vult dare Leges suas creaturae rationali, quia prius recta ratio sua judicet hoc esse faciendum, sed e contra potius. Videtur igitur positio esse magis Catholica & expedita, si dicamus neutrum prius esse altero in Deo sicut in simili, non ideo quia sicut est in re Deus sic judicat, nec proprie e contra, sed correlativa sunt, & concomitantur quodammodo sese inferentia: ita in proposito & multis similibus."

If we are to find right reason elsewhere, that is, outside God, then that right reason is somehow a consequence of God's activity. This is the idea underlying the next explanation, namely, that "right reason belongs consequently and participatively only to rational creatures."[116] The idea that rational creatures are participating in God's eternal reason had become commonplace in medieval scholastic thought with Thomas Aquinas, and Gerson in his turn now follows this line.[117] In Gerson's account this idea is accompanied by the notion that man's right reason is a consequence of God's reasoning. Without God's activity there would be no rational activity in the world. This is the idea that Gerson wants to take to its logical conclusion. If a right is a faculty of action that is appropriate to one according to the dictate of divine right reason, does this mean that all created, active powers are rights? This is the conclusion that Gerson reaches:

> Therefore, we say that every positive entity has as much of right thus generally defined as it has of being and consequently of goodness. In this way the sky has a right to raining, the sun to shining, the fire to warming, the swallow to building its nest, and even every creature whatsoever [has a right] to all things that it can do well by natural faculty.[118]

Rights can be predicated of every creature, which Gerson here treats from the point of view of their natural faculties. Whenever there is a God-given natural faculty, there is a right. Therefore, animals and other creatures equipped with natural faculties could in fact be understood to possess rights. With this conclusion, Gerson broadens the scope of applicability of the term "right" and emphasizes his divergence from the hierarchical metaphysics of essence that characterized Fitzralph's usage of the term. Gerson is careful to remark that he is speaking of rights in the general sense of the term and furthermore, that rights are understood by political theorists in a narrower sense than Gerson defines them. Nevertheless, according to Gerson, this general view is justified because "no proximate power or faculty falls

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[116] Gerson, *De vita spirituali animae*, lectio 3, 26: "Recta ratio consequenter & participative solum convenit rationalibus creaturis."

[117] See Thomas Aquinas, *Summa theologiae*, 1a2ae, q. 91, a. 2, co. See also Brett 1997, 82–83.

[118] Gerson, *De vita spirituali animae*, lectio 3, 26: "Dicamus igitur, quod omne ens positivum quantum habet de entitate & ex consequenti de bonitate, tantumdem habet de Jure sic generaliter definito. In hunc modum coelum jus habet ad influendum, sol ad illuminandum, ignis ad calefaciendum, hirundo ad nidificandum, immo & quaelibet creatura in omni eo quod bene agere naturali potest facultate…"

to someone without the dictate of divine right reason." The origin of any faculty can be traced back to divine law.[119]

Gerson's definition of right corresponded to the prevailing view of justice. In *De potestate ecclesiastica* where instead of speaking of "the dictate of right reason," Gerson used the phrase "the dictate of primary justice," the connection between rights and justice was explicit.

> So justice is described as a continuous and lasting will to assign everyone his *ius*. This description principally fits divine Justice in relation to His creatures. Indeed, God is the only one who by continuous and lasting will gives every single thing what is his; his (*suum*)—I say—not due to any rigorous obligation, but due to the freest and most dignified donation by the Creator.[120]

Gerson's definition of justice was well known and a widely used quotation from Roman law, and was originally formulated by the ancient Roman lawyer Ulpian.[121] Gerson's emphasis on God as the ultimate seat of justice was a concept that he shared with medieval legal minds. The medieval lawyer Azo, for example, who taught Roman law at Bologna at the beginning of the thirteenth century, began his explanation of Ulpian's definition with a similar comment.[122] Ulpian's definition of justice relied on the ancient principle that justice is realized when everyone gets what rightly belongs to him. In his commentary, Azo followed a similar line of thinking and explained that by *ius suum* was meant "man's desert," what is due to man.[123]

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[119] Gerson, *De vita spirituali animae*, lectio 3, 27: "Propterea non absurde concedi posset nihil alicui competere nisi Jure divino, quemadmodum nulla est facultas aut potestas propinqua conveniens alicui absque dictamine recto divinae rationis…"

[120] Gerson, *De potestate ecclesiastica*, consideratio 13, 250: "Describitur itaque Justitia, quae est perpetua & constans voluntas, jus suum unicuique tribuens. Haec autem descriptio competit principaliter Justitiae divinae in ordine ad suas creaturas. Deus nempe solus est, qui voluntate perpetua & constanti dat unicuique rei quod suum est; suum, inquam, non ex debito rigoris, sed ex liberalissima & dignissima donatione Creatoris."

[121] See Dig. 1.1.10.

[122] Azo, *Summa*, De iusticia et iure: "Est autem iusticia constans et perpetua voluntas ius suum cuique tribuens ut ff c. 1. iusticia que diffinitio potest intelligi duobus modis uno prout est in creatore altero prout est in creatura et si intelligatur prout est in creatore id est in deo omnia verba proprie posita sunt, et plana sunt omnia quasi diceret iusticia est dei dispositio que in omnibus rebus recte constituit, et iuste disponit, ipse retribuit unicuique secundum opera sua, ipse non est variabilis ipse non est temporalis in dispositionibus vel voluntatibus suis immo eius voluntans est constans et perpetua ipse enim nec habuit principium nec habet vel habebit finem."

[123] Azo, *Summa*, De iusticia et iure: "Vel dic suum ius id est hominis meritum."

If one reads Ulpian's definition as a definition of justice—as intended—one is inclined to find many significations for the term *ius*. Man's desert may consist of many kinds of things. This is exactly the pattern of thought in the lawyer Azo's text: "therefore, *ius* is derived from justice and has various significations."[124] In Gerson, however, we encounter something different. Although Gerson refers to Ulpian's description of justice, it is precisely his intention not to assimilate *ius* with man's rightful desert. This point emerges in *De vita spirituali animae* when Gerson justifies his choice of genus for the term "right":

> Faculty or power is put down in the description, for many things are appropriate to someone according to the dictate of right reason which are not to be called their rights, such as the suffering of the damned, such as the punishment of the vicious, for we do not say that someone has a right to his injury.[125]

In Gerson's view, not everything that is appropriate to someone according to the dictate of right reason deserves to be called *ius*. With respect to injurious things and suffering, one is a passive recipient, whereas a right is power and marks the subject as an agent. This is the main difference between rights and other things that fall to someone's share, according to the dictate of right reason or of primary justice.[126]

1.8. *Antoninus of Florence*

The *Summa theologia* written by the Dominican Antoninus of Florence (1389–1459) is an appropriate end to our enquiry into the medieval rights discourse for two reasons. The first reason is that Conrad

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[124] Azo, *Summa*, De iusticia et iure: "Ius ergo derivatur a iusticia et habet varias significationes."

[125] Gerson, *De vita spirituali animae*, lectio 3, 26: "Ponitur in descriptione facultas seu potestas, quoniam multa conveniunt secundum dictamen rectae rationis aliquibus quae non dicuntur jura eorum, ut poena damnatorum, ut punitiones vitiosorum, non enim dicimus aliquem jus habere ad ejus nocumentum…"

[126] It might be tempting to interpret Gerson further and infer that the reason why rights do not relate to these harmful things is because these are things that fall to an individual's share without an act of will on his behalf and even against his will; they are something that is distributed to person's share from the outside and are not under his control. In brief, these things oblige; they do not grant any freedom of action. Cf. Tuck 1979, 25–26. There are reasons, however, that encourage us to refrain from reading an emphasis on control and liberty too strongly into the notions of faculty or power here. Above all, in the chapter that follows in Gerson's work, he does not hesitate to associate the idea of a right with animals and even with non-sentient beings.

Summenhart uses Antoninus's work as his source for certain themes in his own discussion. Antoninus's formulations, written in 1450s, apparently provided Summenhart relevant material that was relatively up to date. The influence of Antoninus's text is apparent in *Opus septipartitum*, although it is by no means as significant as Gerson's influence. In some chapters Summenhart follows Antoninus almost verbatim and at times he writes directly against Antoninus's formulations in ways that make his source implicitly transparent. In still other chapters, Summenhart uses Antoninus's writing as a disposition or model for structuring his own discussion of juridical terminology and the theme of property. Yet Summenhart seldom explicitly mentions Antoninus as his source.[127]

The second reason for reviewing Antoninus's writing lies in manner of building a discussion of *ius* on formulations that were derived from the debate on Franciscan poverty. Thus, for its part Antoninus's work demonstrates the long-standing influence of Franciscan discourse. This rather specific and peculiar polemic generated language that was usable and valid enough to outlive its original context.

Antoninus discusses the terminology of rights in the third part of his *Summa theologia*, a part whose general title was *Status*. In the chapter *De declaratione terminorum usufructus usus possessionis proprietatis dominii et iuris*, Antoninus compares "dominion" to "right" and suggests two different interpretations for the mutual relationship of these terms. He points out that there are some teachers who believe that "dominion" and "right" mean the same with respect to a thing (*in re*), because one has as much dominion in a thing as one has right. This holds true when we speak of the thing itself and also when we speak of the use of that thing. "Whence, if one has a right in a thing (*ius in re*), then one has dominion over the thing (*dominium in re*). If one has right to use a thing, then one has *dominium* over the use of the thing."[128] Antoninus does not attribute this interpretation to anyone, but, as we

[127] Summenhart's use of Antoninus has be noticed by Ott and Brett. See Ott 1966, 2–3, and Brett 1997, 109.

[128] Antoninus of Florence, *Summa theologia*, part III, chap. 3, F3v: "Dominium, nam secundum aliquos doctores et ius idem dicunt in re, quia tamen habet aliquis de dominio in re, quantum habet de iure. Unde si habet ius in re, habet dominium in re. Si habet tamen ius in usu rei, habet tamen dominium in usu rei."

have seen, the idea of the equivalence of right and dominion had been used by the disputants in the Franciscan case.[129]

However, Antoninus himself is not in favor of the equivalence of right and dominion, but promotes an alternative interpretation:

> However, according to certain teachers, the opposite seems to be true, and the very reason is, because according to the Philosopher and Simplicius in the *Predicamentis*, the relation of *dominus* is a relation of superposition, and indeed no one is said to have *dominium* in something unless that is subordinated to him, but someone can have *ius* in something to which one is not subordinated, even the other way round, as the son has a right to the father, similarly the servant to the master, because these are obligated to them in the matter of subsistence… Therefore *ius* and *dominium* are not the same; moreover, according to those [teachers] a right has its place in more things than dominion because dominion is a right, but not every right is dominion. Dominion namely seems to add a certain superiority and authority to right.[130]

There is no doubt that Antoninus favors this latter opinion, which promotes a hierarchical concept of dominion. Dominion is a relation of superposition, which the *dominus* has toward the inferior. This view of dominion came through the philosophical tradition, as Antoninus recognizes. In following Aristotle, many medieval authors mentioned dominion as an example of an entity or of terms that

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[129] The equivalence was also recognized by jurists in the fourteenth century. Bartolus of Saxoferrato (1313–1357) introduced a distinction between the strict and broad senses of dominion, treating broad dominion as equivalent to a right. Antoninus's remark concerning the 'dominion over the use of the thing' corresponds to Bartolus's language. For Bartolus's terminology, see Coing 1953.

[130] Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F3v: "Aliquibus autem doctoribus videtur oppositum, et tota ratio est, quia secundum philosophum et simplicium in predicamentis, relatio domini est relatio superpositionis, et immo nullus dicitur habere dominium in aliquo, nisi sit sibi suppositus, sed aliquis non [*sic*] potest habere ius in aliquo, cui non est suppositus, immo econtra, sicut filiusfamilias habet ius in patre, similiter servus in domino, quia tenetur eis ad alimentationem… ergo ius et dominium non sunt idem immo secundum istos ius se habet in plus quam dominium quia dominium est ius, sed non omne ius est dominium. Dominium, nam videtur sibi addere ius quandam superioritatem et auctoritatem." There seems to be a printing error in this Latin text: an extra word 'non' in the place that I have indicated. As it stands, the texts suggests that *dominus* cannot have rights towards the subjects. This does not make any sense. A point of some interest is that Antoninus uses the ablative form when he is speaking of rights that are held over persons; for example, he speaks of *ius in patre*. This was exceptional. The accusative form (e.g., *in patrem*) would have been the normal usage in legal discourse. The ablative form was used in speaking of (property) rights over material things.

belong to the category of relation.[131] Antoninus applies this hierarchical view of dominion to the basic legal view in which dominion was seen as one right among many. "Dominion is a right, but not every right is dominion." Further, while his interpretation attributes a hierarchical connotation to "dominion," he denies the "right" of any hierarchical connotation. A person can have a right to his equals, his superiors, and his inferiors. To Antoninus, a "right" is not "authority"; to possess a right that obligates others does not presuppose any (superior) position.

When Antoninus sets out to describe what is understood by the term *ius* in the context of property, he turns to the language that had been used in the Franciscan controversy. Antoninus argues that

> Right is the power of exercising an act with regard to a thing. Thus, if I can sell a book licitly, I have the right with respect to the sale of the book; if I can read and study it licitly, I have the right only with respect to the reading and study of the book. And so as a general conclusion, insofar as I have licit power with regard to a thing, so do I have right with regard to it.[132]

To justify this interpretation Antoninus quotes an author whom he introduces as "a great master who wrote against the *Fratricelli*, but whose name I could not come upon."[133] Most likely, this anonymous master was Hervaeus Natalis. Antoninus repeats the paragraph in which Hervaeus maintained the equivalence between a "right" and "licit power." Antoninus notes that "man has only *duplex posse* with respect to things falling to the use of human life." First, there is the power of fact or execution by which man can use things, licitly or illicitly. Second, there is the power by which man may use things licitly.

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[131] See Aristotle, *Categoriae vel predicamenta*, 7 (6b30).

[132] Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F4r: "…ius est potestas exercendi aliquem actum circa rem. Unde si licite possum vendere librum, habeo ius in venditione libri, si licite possum in eo legere et studere, habeo solum ius in lectione et studio libri, et sic generaliter concludendo, quantum habeo de potestate licita circa rem, tantum habeo de iure circa eam."

[133] Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F4r: "Hec omnia quidam magnus magister in libello contra fratricellos, cuius nomen adhuc non inveni." Here, Antoninus uses the term *fratricelli*, which was a name used for the spiritual Franciscans as distinct from the conventional Franciscans. This term was not altogether misplaced, however, for the Michaelists too, that is, the followers of Michael of Cesena (1270–1342), were counted among the *fraticelli*, and Michael of Cesena was the general of the Franciscan order at the time Hervaeus wrote his thesis. On the appellation *fratricelli*, see Burr 2001, 302–303. Cf. Brett 1997, 109.

"But *posse* only of fact does not mean *posse* of right; therefore, *posse* licitly means *posse* of right."[134]

Although Antoninus is practically quoting Hervaeus's writing, he does not seem to adopt his position entirely. As noted earlier, Hervaeus's moral conclusions were conditioned by the dichotomy between the factual and the legal realms. This meant that when a person was using a thing licitly, there were in fact two different kinds of power operating simultaneously. First, there was the power of fact, which was necessary for any use of material things. Second, there was the power of right, which made the use licit. These two powers were different as powers. However, if one is not inclined to think in terms of the dichotomy between the realms of fact and right, then one may feel the need to simplify the terminology. This is exactly what Antoninus seems to have in mind:

> So, in the matter concerning us here, it is correct that, although *posse facti* is in itself common to licit and illicit use, for everything is *de facto* used either licitly or illicitly, nevertheless, according to the common view we put *posse facti* against *posse iuris* by saying that this person is capable *de facto*, who can exercise an act, but illicitly. But only the person who is capable *de iure* can exercise the act licitly. Therefore it is true that *ius* does not mean anything other than the power to exercise another act licitly.[135]

For Antoninus then, the power of fact and the power of right do not differ as powers; the only significant difference is a moral one between the illicit and the licit power of acting. Antoninus's independence from the setting of the debate over Franciscan poverty is also indicated

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[134] Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F4r: "…homo circa rem aliquam venientem in usum vite humane, non habet nisi duplex posse, scilicet posse facti seu executionis, quo potest homo uti illa re licite. Sed posse solius facti non dicit precise posse iuris, ergo posse licite dicit posse iuris. Maior patet, quia non video, quod circa aliquam rem homo possit habere aliquod posse, nisi vel posse facti absolute, quo potest uti etiam illicite vel posse licite. Sed minor faciliter probatur, quia illud quod sit de iure sit licite ergo posse facti non est posse iuris." The quotation is not exactly identical to Hervaeus's text. In fact, Antoninus's version is slightly confusing. The match is close enough, however, to confirm that Hervaeus was the source. Cf. chapter 1.4. above.

[135] Antoninus of Florence, *Summa theologia*, pars 3, chap. 3, sig. F4r: "Sic recte est in proposito, quod posse facti licet secundum rem sit commune licite et illicite utenti, quilibet enim de facto utitur sive licite, sive illicite utatur, tamen secundum communem acceptionem condividimus posse facti contra posse iuris dicendo, quod ille potest de facto, qui potest aliquem actum exercere, sed illicite. Ille autem potest de iure, qui potest actum solum licite exercere. Patet ergo, quod ius non dicit aliquid aliud, nisi potestatem licite exercendi aliquid aliud actum."

by the fact that he does not paradigmatically keep to the context of ownership and use of material things. Instead, he employs a general expression and speaks of the power to exercise actions. For Antoninus, "*ius* does not mean anything other than power to exercise another act licitly." Apparently, Antoninus is not referring here to the juridical actions exercised in the court, but rather to human actions, which form the subject matter of morality.

PART TWO

CONRAD SUMMENHART'S THEORY

INTRODUCTION TO PART TWO

Conrad Summenhart's *Septipertitum opus de contractibus pro foro conscientie atque theologico* (1500) is a book about contracts. More specifically, Summenhart's fundamental task is to analyze contractual situations using the tools provided by casuistic moral theology. The question that shapes Summenhart's discussion throughout his analysis is whether it is licit for person A to act B in circumstances C. The basic economic contracts defined by jurisprudence provide the framework for his inquiry. Summenhart's moral casuistry starts in the second tract of the treatise. The first tract contains preliminary discussion; it embodies Summenhart's view that there is something the reader should familiarize himself with before entering into the detailed casuistry of the following six tracts. As might be expected, this preliminary material includes a section in which Summenhart clarifies the concept of contract.[1] Perhaps less expectedly, the remaining pages are occupied by a long and detailed inquiry during which Summenhart introduces his reader to the language of individual rights.

Summenhart's discussion of rights terminology has few—if any—equals in late medieval rights discourse. The length and the detail of his discussion is considerable. Summenhart's develops his theory of individual rights in *Questiones* 1–14, which take up nearly seventy printed pages. An even more striking feature is Summenhart's consistent effort to formulate and systematize his concepts. In *Questio* 1 Summenhart approaches individual rights on a basic level, giving a detailed answer to the question: What is an individual right? This is followed by a discussion (*Questiones* 2–7) that clarifies how right is divided into species. The issue is to clarify what kinds of rights exist. The third part of his theory serves to connect or reconcile his approach to the terminology used in contemporary jurisprudence. This includes first, an account that provides justification for the institution of private ownership (*Questiones* 8–11), and second, a detailed discussion of the four juridical property rights: *usus, usufructus, proprietas*, and *possessio* (*Questiones* 12–14).

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[1] Summenhart dedicates two questions to the concept of contract. In *Questio* 16 he discusses various definitions for contract, and in *Questio* 17, the species of contract. See *Opus septipartitum*, q. 16–17, sig. F4v-G3v.

CHAPTER TWO

THE RIGHT OF THE INDIVIDUAL

In Summenhart's theory of rights Jean Gerson's language of rights reappears. This can be seen at the very beginning of Summenhart's thesis. In *Questio* 1 of *Opus septipartitum*, Summenhart launches his inquiry into legal terminology with the following question:

> Whether two descriptions of right and one description of dominion are well and masterfully posited by the master who maintains that: Right is a proximate power or faculty appropriate to someone according to the dictate of primary justice. And again: Right is a proximate power or faculty appropriate to someone according to the dictate of right reason. And dominion is a proximate power or faculty of assuming other things into one's faculty or licit use according to rights (*iura*) or rationally instituted laws.[1]

The master to whom Summenhart refers is Jean Gerson, and the definitions of right and dominion derive from Gerson's works *De vita spirituali animae* and *De potestate ecclesiastica*.[2]

As far as the two descriptions of right are concerned, Summenhart regards them as correct, and his discussion takes the form of a commentary in which he draws attention to several passages in Gerson's explanation of the descriptions. By contrast, his discussion of dominion almost completely lacks any references to Gerson's explanation. The reason is that Summenhart promotes the view that "right" and "dominion" are considered equivalents, which was not explicitly

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[1] *Opus septipartitum*, q. 1, sig. A6r: "Utrum due descriptiones iuris et una descriptio dominii, sint a magistris bene ac magistraliter posite, quibus dicitur. Ius est potestas vel facultas propinqua conveniens alicui secundum dictamen prime iusticie. Et iterum. Ius est potestas vel facultas propinqua conveniens alicui secundum dictamen recte rationis. Dominium autem est potestas vel facultas propinqua assumendi res alias in sui facultatem vel usum licitum secundum iura vel leges rationabiliter institutas." Here, the text speaks of "masters", but this seems to be a printing error, for the reference to Gerson is clear enough.

[2] The description or definition of dominion is derived from Gerson's *De potestate ecclesiastica* (consideratio 13, 250), and so is the first definition of a right (consideratio 12, 252). The second definition of a right is taken from Gerson's *De vita spirituali animae* (lectio 3, 26). The definition of dominion is not exactly identical to Gerson's original. See the discussion below in chapter 2.2.1.

maintained by Gerson. Another departure from Gerson is indicated in the question above. Along with inquiring whether the above definitions are valid or good, Summenhart asks whether the definitions are masterful. The answer presupposes knowledge of the scientific category to which the entities belong. Summenhart interprets right and dominion as belonging to the category of relations and conducts his inquiry from this point of view, which was not explicitly shared by Gerson. His conclusion once again is positive, and he defends Gerson's definitions as masterfully posited.

Below I have organized my discussion around these three themes: right as power, right as dominion, and right as a relation.

2.1. *Right as power*

At the beginning of the discussion of his definitions, Summenhart introduces a distinction that clarifies the use of the term "right" in the present context. He notes that "right" is taken in two ways. In the first sense "right" signifies the same as the term "law" (*lex*). "Right" is taken in this sense when we speak of the precepts of God as *ius divinum* and of the constitutions of the church as *ius canonicum* and of the emperors' constitutions as *ius civile* or *imperiale*. Summenhart notes that "right" is taken in this sense in the description of dominion above when it is said "according to rights etc."[3] He continues:

> In another sense "right" means the same as "power" in the sense it is taken when we speak of a father having a right over his son (*in filium*), a king over his subjects (*in subditos*) and men having a right in their things and possessions (*in rebus et possessionibus suis*) and sometimes even in persons (*in personis*), as with slaves. In this way it is taken in civil law, as [is stated in] *Institutes, de iure personarum*, that the right of the persons is divided into *ius patrie potestatis* and *ius dominii* with respect to slaves. And "right" is taken in this way when it is described by the aforesaid two descriptions.[4]

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[3] *Opus septipartitum*, q. 1, sig. A6r: "Prima suppositio, ius capitur dupliciter. Uno modo prout idem est quod lex, quo modo accipitur cum dicimus precepta dei esse ius divinum, et constitutiones ecclesie esse ius canonicum, et constitutiones imperatorum esse ius civile vel imperiale. Et hoc modo accipitur ius in descriptione dominii cum dicitur secundum iura etc."

[4] *Opus septipartitum*, q. 1, sig. A6r: "Alio modo accipitur ius ut idem est quod potestas quo modo accipitur cum dicimus patrem habere ius in filium, regem in subditos, et homines habere ius in rebus et possessionibus suis, et etiam in personis aliquando,

Here, Summenhart identifies the context for the discussion into which he places Gerson's definitions: Right as power belongs to the discussion in which an individual's relation to other individuals and material objects is defined juridically.[5] He explicitly recognizes the distinction between rights that the right-holder has in corporeal things and rights that are held with respect to persons, a distinction that was customary in contemporary jurisprudence. In this view, a father's right over his offspring is a distinct kind of right from the right in things and possessions. Summenhart also mentions the standard exception to this principle: a slave was considered property (as well as a person), and thereby the master was said to have rights in slaves rather than over slaves.[6]

In the quotation above, Summenhart states that "right is the same as (*idem est quod*) power." He also used this construction *idem est quod* in the previous passage when he said that right is the same as law, but in a different meaning. In saying that right is the same as law he meant that "right" and "law" are fully equivalent as terms. In saying that right is the same as power, his point is that right is a kind of power or that the genus term for right is power. The question that then immediately arises is: How are we to qualify the term "power" in order to achieve full correspondence with the term "right"?

Summenhart's commentary on Gerson's descriptions of right imposes two kinds of qualifications on the term "power": descriptive and normative. Descriptive qualifications arise from his explanation of the expression "faculty of power" and of the related attribute "proximate." Normative qualifications arise from his explanation of the latter part of the description: "appropriate to someone according to the dictate or right reason or primary justice."

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puta in servis, quo modo capitur in iure civili, ut Institutes, de iure personarum, quod ius personarum dividitur in ius patrie potestatis, et in ius dominii respectu servorum. Et hoc modo capitur quando describitur ius predictis duabus descriptionibus."

[5] Summenhart's modern commentators have noted the historical significance of the distinction between right as law and as power. Tierney has stressed the general importance of this distinction. According to him, "Marsilius of Padua had presented a similar distinction. Summenhart gave it a new currency. From this time onward a distinction between the 'subjective' and 'objective' meanings of *ius* became a characteristic feature of early modern rights language." Tierney 1997, 243.

[6] Brett has aptly paid attention to this relational aspect which appears in the terminology of rights in Roman law, and is compatible with Summenhart's classification of right as a relation. Brett 1997, 36–37. For Summenhart's discussion of the juridical property rights, see chapters 4.2 and 4.3. below.

2.1.1. *Right as an active potency*

As a sort of preliminary to his commentary on Gerson's descriptions of right, Summenhart demonstrates how the two descriptions or definitions are in fact equivalent or how they amount to the same.[7] In doing so, he acknowledges certain assumptions from theological metaphysics in the background of Gerson's language of rights. The definition in *De vita spirituali animae* relates right to the dictate of right reason, and the definition from *De potestate ecclesiastica* relates right to the dictate of primary justice. In explaining this, Summenhart notes that there are two ways to understand the term "right reason." First, "right reason" may refer to what is originally and essentially right, and in this sense right reason is the same as primary justice. Summenhart thus seems to refer to Gerson's observation that, "as attributed to God the dictate of right reason and primary justice are synonyms."[8]

Second, Summenhart continues by saying that "right reason" is taken more generally, meaning either the essential right reason that is in God only or the participative right reason that is encountered in rational creatures.[9] Summenhart's point is that all dictates of participative right reason are reduced to essential right reason and consequently, to primary justice.[10]

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[7] For Gerson's view, see chapter 1.7. above. In Supposition 3, Summenhart identifies the textual origin of these descriptions. "Tertia suppositio, prima descriptio iuris ponitur per Johannem de gersona, in tractatu de potestate ecclesiastica, consideratione xiii, que consideratio alius intitulatur de origine iuris et legum. Et dictamen accipitur in illa descriptione iuris pro lege, hoc dico, quia dictamen equivoce accipitur aliquando pro lege dictata, aliquando pro actu rationis dictantis. Secunda vero descriptio, ponitur ab eodem in tractatu de vita spirituali anime lectione tertia." *Opus septipartitum*, q. 1, sig. A6v.

[8] Gerson, *De potestate ecclesiastica*, consid. 13, 250: "…dictamen vero rectae rationis et primae justitiae conveniunt in deo synonime."

[9] Here, Summenhart seems to be referring to Gerson's explanation of "right reason" in *De vita spirituali animae*, lectio 3, 26.

[10] *Opus septipartitum*, q. 1, sig. A6v: "Quarta suppositio, secunda descriptio redit in idem cum prima. Nam in secunda descriptione, tres prime clausule sunt omnino eedem in utraque. Sed et quarta clausula licet secundum vocem aliter ponatur in prima et secunda tamen in re est eadem utrobique, quod sic probatur. Recta ratio accipitur vel pro ea recta ratione que primo originaliter et essentialiter est recta, et tunc idem est quod prima iusticia, et sic ille clausule omnino equivalent in prima et secunda descriptionibus, aut recta ratio accipitur generaliter ad rationem rectam sive illa sit recta ratio essentialiter qualis est in solo deo, sive participative qualis reperitur in creaturis rationalibus. Et tunc illa clausula secunde descriptionis iterum redit in idem cum clausula prime, quia omne dictamen illius rationis recte que est participative recta ratio, reducitur ad rationem rectam que est essentialiter recta ratio, et per consequens reducitur ad primam iusticiam."

Summenhart's first *Conclusio* is that the (first) definition of right is good, and he seeks to justify his conclusion by explaining the single clauses that constitute the description.[11] First, "power or faculty" is given as the genus term in the definition. Summenhart defends its accuracy as follows:

> For when someone has a right in a thing, it means that he is able (*posse*) to do something to that thing (*in illam rem*) or in that thing (*in illa re*); therefore right is power (*potestas*); the consequence holds by the *locus a coniugatis*.[12]

From *posse* follows *potestas*; here Summenhart applies a rule of argument that in medieval logic was called *locus a coniugatis*.[13] Here we also encounter Summenhart's own terminology. Summenhart classifies rights and related actions by using a distinction *in re*/*in rem*. He uses this distinction repeatedly on the pages of *Opus septipartitum*, but he never explains his rationale. However, as applied to rights, this distinction seems to follow the distinction between a right in a thing (*ius in re*) and a right over a person (*ius in personam*), which was customary in medieval jurisprudence.

Summenhart continues by noting that as the genus of right is expressed by two terms, "power or faculty," it might be asked which term describes the genus more accurately. According to him, Jean Gerson preferred the term *facultas*, but gave no specific reason for this preference. On this point, Summenhart feels the need to elaborate on his master's point.[14] He says that to have a faculty in a thing means that the person "has a power of acting toward the thing or in the thing; I say of acting not in any way whatsoever that is licitly or illicitly,

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[11] Summenhart's starting point seems to be the basic Aristotelian meaning, according to which a definition is good if it fits every example of the defined and makes the defined differ from everything else in the same genus. He explicates this in discussing the rights of use and usufruct. See chapter 4.2.1. below.

[12] *Opus septipartitum*, q. 1, sig. A6v: "Nam aliquem esse habentem ius in aliqua re, est eum posse aliquid in illam rem vel in illa re, ergo ius est potestas, tenet consequentia per locum a coniugatis."

[13] See Peter of Spain, *Tractatus*, V, 76. Summenhart repeatedly applies this rule in his account.

[14] *Opus septipartitum*, q. 1, sig. A6v: "Et si quis dicat. Exquo sua disiunctione ponitur pro genere potestas vel facultas, quod illorum convenientius ponitur pro genere. Dicendum ut placuit Johanni de Gersona, quod convenientius ponitur facultas (prout a fas derivatur) pro genere quam potestas, rationem non assignat, sed posset esse hec."

but licitly."[15] Here, Summenhart refers to Gerson's etymological remark that faculty (*facultas*) is derived from equity (*fas*).[16] This indicates that the term "faculty" includes the normative connotation of "licit," and thus would seem to be the preferred genus term for right, since the term "power" does not have any normative connotation—at least, says Summenhart, not "when we take 'power' in a broad sense the way we say that a robber can kill."[17] Summenhart does not, however, consider the preference for the term "faculty" to be definitive. He notes that the term "power" can be taken in the strict sense according to which we can do something only when we can do it *de iure* or licitly. On this point, Summenhart explicitly refers to the civil legal maxim "*id possumus quod de iure possumus.*"[18] Further, he says that the normative qualification of power is made by the last clause of the description "appropriate to someone according to the dictate of right reason or primary justice." This is because "power that is appropriate to someone according to the dictate of primary justice is the power of acting licitly."[19]

Having thus implied that we may safely ignore the normative connotations while discussing the genus term for right, Summenhart moves on to clarify more precisely what is meant by the genus term "faculty or power." In so doing, Summenhart turns to the language of natural philosophy.[20] The way was shown by Gerson himself, who

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[15] Ibid.: "Nam hominem habere facultatem in aliqua re, est eum habere potestatem agendi aliquid in illam rem, vel in illa re, agendi inquam non qualitercumque scilicet licite vel illicite, sed tamen licite, facultas enim ut a fas derivatur connotat licere."

[16] Gerson, *De vita spirituali animae*, lectio 3, 26.

[17] *Opus septipartitum*, q. 1, sig. A7r: "Potestatem autem habere in aliquam rem denotat posse agere aliquid in illa re vel in illam rem non precise licite, sed sive licite sive illicite, saltem irristricte capiendo potestatem, quomodo dicimus quod latro possit occidere, licet restricte capiendo solum hoc dicamur posse quod de iure seu quod licite possumus."

[18] This maxim, which is derived from the *Digesta* of Roman law, was widely used in medieval legal discourse, cf. Baldus de Ubaldus, *Consilia*, 326–327: "Quoad primum certum est quod id possumus quod de iure possumus, ut ff. de uerb. sign. Nepos proculo." See Dig. 50.16.125.

[19] *Opus septipartitum*, q. 1, sig. A7r: "Hec tamen causa preferendi illum terminum facultas non cogit omnimode, quia etiam si potestas ponatur loco generis, satis restringeretur per ultimam clausulam descriptionis ad standum pro potestate que quis aliquid licite potest, quia ultima clausula dicit conveniens alicui secundum dictamen recte rationis vel prime iusticie. Potestas autem secundum dictamen prime iusticie alicui conveniens est potestas licite agendi aliquid."

[20] Grossi has interpreted Summenhart's use of the term *facultas* in the spirit of medieval voluntarism. He refers to the definition of *dominium* in which the term *facultas* occurs in a way similar to the definition of *ius*: "Vi risalta poi un termine

in his description of right qualified the term "power" by giving it the attribute "proximate" (*propinqua*). Summenhart understands the term "proximate" in light of the distinction between proximate and remote potency, which was employed in medieval natural philosophy.[21]

Summenhart concludes that the term "proximate" (*propinqua*) is posited in the description of right to exclude three powers. This conclusion is based on his exegesis of Gerson, and, as we will see, he will modify it later. In *De vita spirituali animae*, Gerson explained the use of the attribute "proximate" by pointing out that many things can belong to an individual according to the dictate of right reason, which according to the same dictate do not belong *de facto* to the individual. Gerson clarified this somewhat vague explanation with an example: "The one who actually exists in deadly sin has the power or faculty to merit eternal life, but not proximate [power], or, as one is wont to say, not according to present justice."[22] Summenhart repeats this example. According to him, it exemplifies remote power, which is the first of those three powers that are excluded by the attribute "proximate" in the definition of right.

> Example: A deadly sinner has the power to merit beatitude, and it falls to him according to the dictate of right reason, because he has this power according to divine dictate and divine will; but that is not a proximate power, because he cannot proceed right away to meritorius acts while remaining in that state, but there is a transition required of him, from

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'facultas', corrente nell'uso di tutta la Scolastica, ma particolarmente frequente nella Scolastica francescana a indicare una potenza del soggetto, che, lasciato il terreno astratto della pura potenzialità, è divenuta una posizione di libertà dell'individuo, dinamica, espansiva ed incisiva nella realtà che lo circonda." Grossi 1973, 202. As far as Summenhart's view is concerned, this description is misleading. The proper framework for Summenhart's interpretation of the term "faculty" is physics rather than voluntarism. The point has been acknowledged by Brett, but not in Tierney's interpretation. See Brett 1997, 38, and Tierney 1997, 247–248.

[21] The distinction between *potentia remota*/*propinqua* belonged to the Aristotelian scientific vocabulary. The distinction was commonly used in the context of physics and cosmology. See e.g., John Buridan, *Expositio et quaestiones in Aristotelis De caelo*, q. 23, 362. The distinction was also employed in *De anima* literature in connection with the faculties of the soul. See e.g., Jodocus Trutfetter, *Summa in totam physicem*, lib. 8.

[22] Gerson, *De vita spirituali animae*, lectio 3, 26: "Ponitur propinqua, quoniam multa possunt alicui competere secundum dictamen rectae rationis, quae secundum idem dictamen de facto ei nequaquam conveniunt; ut existens actualiter in peccato mortali habet facultatem seu potestatem merendi vitam aeternam, non tamen propinquam, vel ut dici solet, non secundum praesentem justitiam."

> not having *charitas* to having *charitas*, and this is why his power is not worthy to be called a right to merit (*ius ad merendum*) [the beatitude].[23]

Here, Summenhart rewrites Gerson's example of the deadly sinner to correspond to the descriptions of remote power in the literature on *De anima*. By remote power was generally meant a potency that could not be actualized owing the lack of dispositions needed to operate, even though the principal potentiality, either passive or active, was present. Likewise, by proximate potency was understood the principal potentiality with the requisite operative dispositions. What was needed for a remote potency to become proximate was a kind of transformation of the remote potency.[24] Summenhart's account follows this idea: In the case of the sinner, the actualization of the power of meriting the beatitude presupposes a transition in the state of the sinner that is affected by the infused *habitus* of charity.

In *De potestate ecclesiastica*, Gerson had used different examples to explain the rationale behind the attribute "proximate" in the definition of right. Gerson observed that the term proximate is needed because it is possible to use the term *potestas* or *posse* when speaking of what is called the potency of obedience or even of logical potency.[25] Again,

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[23] *Opus septipartitum*, q. 1, sig. A7r: "Exemplum. Peccator mortalis habet potestatem merendi beatitudinem, et hoc sibi convenit secundum dictamen recte rationis, quia secundum dictamen divinum et voluntatem divinam habet illam potestatem, sed illa non est propinqua potestas, quia non potest statim exire in actum merendi, manendo in illo statu, sed prerequiritur transitio aliqua in eo de non habere charitatem ad habere, quare illa eius potestas non merebitur dici ius ad merendum." Here we encounter the type of *ius* called *ius ad rem*, which could be described as a right to something that one does not yet have. The term is of canonistic origin and became common in the thirteenth century. See Landau 1971. Summenhart employs the term again in Question 7 in a way that clarifies the distinction between *ius in re* and *ius ad rem*. The example is derived from biblical history: divine election gave David *ius ad regnum,* but not *ius in regno* before Saul's death. *Opus septipartitum*, q. 7, sig. D2r: "…sed divina electio ipsius David dederat ipsi David ius tamen ad regnum, non autem in regno, nec executionem potestatis regie."

[24] One particular theme in which the distinction was applied was the soul's relationship to the body. For example, Pierre D'Ailly maintained, apparently following John Buridan, that the principal potency of vision (of the soul) is equally in the foot as in the eye. However, in the foot there is no proximate power of seeing, but only a remote power, "because the soul without those dispositions required for its operation is not called proximate power, but remote." D'Ailly, *Tractatus de Anima*, pars 5, solutio 3, 11, in: Pluta 1987. For the distinction in Buridan, see Zupko 1993.

[25] Gerson, *De potestate ecclesiastica*, consideratio 13, 250: "Proinde dictum est in descriptione Juris, quod est facultas propinqua etc. propter illa quae in potentia obedientiali convenire possunt cuilibet creaturae, quod posse dicere possumus, vel obe-

Summenhart's interpretation seems to follow Gerson on this point. He repeats Gerson's examples of the potency of obedience (the smallest star exhibits the power or potency of obedience by obeying God in shedding as much light as is shed by the sun);[26] also it seems, of logical potency (those who are damned have a logical potency to blessedness because it is not contradictory for them to be saved from damnation and endowed with eternal bliss).[27] The important point, however, is that Summenhart's explanation leads to a critical conclusion:

> Yet one could much better say that the potency of obedience and logical potency are sufficiently excluded by the genus of the defined, namely, by faculty or power if "power" is properly understood. Thus, "faculty" signifies active potency, that is, potency of acting something with regard to a thing. Similarly, "power", if taken correctly, signifies active potency. Whence power is a species of potency for potency extends to the active and the passive. But the potency of obedience and logical potency are not properly potencies of acting, because being in the potency of obedience to something is not having the potency of acting with regard to that something.[28]

Although Summenhart first suggests that the attribute "proximate" appears in the definition of right in order to exclude three powers, his

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dientiale, vel logicale, secundum quale non dicitur proprie res habere Jus vel Legem, sicut non dicimus quod damnati jus habeant ad beatitudinem aeternam, nec quod stella jus seu facultatem habeat, in tanta luce quanta refulget, in sole; licet in potentia obedientiali creaturae vel absoluta Dei, possint haec omnia fieri." Apparently, these potencies exemplify power in a weak or very specific sense of the term. The potency of obedience could be characterized as a receptive capacity, while the logical potency seems to be the antonym for the conceptual impossibility. Someone has a logical potency to act in a certain way if no contradiction is involved in claiming that he is acting that way.

[26] *Opus septipartitum*, q. 1, sig. A7r: "Exemplum. Minima stella est in potestate, vel potentia obedientiali ad diffundendum de se tantum lumen quantum diffunditur a sole. Et hec potentia convenit sibi secundum dictamen prime iusticie. Nam prima iusticia dictat, et vult quod stella debeat obedire in tali actu diffusionis si deus eum sibi conferret."

[27] *Opus septipartitum*, q. 1, sig. A7r: "…ut damnati habent potentiam logicalem ad beatitudinem, quia non repugnat eis quod eripiantur de damnatione, et dotentur beatitudine. Et hec non repugnantia convenit eis secundum dictamen recte rationis."

[28] *Opus septipartitum*, q. 1, sig. A7r: "Posset tamen et forte melius dici quod potentia obedientialis et potentia logicalis satis excluduntur per genus diffiniti scilicet per facultatem seu potestatem si potestas proprie capiatur. Nam facultas significat potentiam active se habentem, id est potentiam aliquid agendi circa aliquid. Similiter et potestas si proprie capiatur significat tamen potentiam active se habentem. Unde potestas quasi species est potentie quia potentia se extendit ad activam et passivam. Modo potentia obedientialis atque logicalis non sunt proprie potentie agendi, quia aliquem esse in potentia obedientiali ad aliquid non est ipsum habere potentia agendi circa aliquid."

final conclusion is that the attribute is there solely to exclude remote power. It is the genus term for right, that is, "faculty or power" or "active potency," that excludes the potency of obedience and logical potency, both of which, according to Summenhart's classification, exemplify passive potentiality. This passage is the first occasion on which we encounter Summenhart's distinctive view of active potency. According to him, active potency means "the potency of acting something with regard to a thing." This interpretation is conditioned by his relational view of potency, which will be discussed below in chapter 2.3.

2.1.2. *Right as derived from justice*

Summenhart's clarifications of the equivalence of right with power are not exhausted by the qualification that right is the same as proximate active potency. Active potencies belong to the natural realm, whereas a right is an entity of the normative realm. Therefore, to get from "active potency" to "right", "active potency" must be qualified in a normative way. In Gerson's descriptions, this qualification is attributed to the characterization "appropriate to someone according to the dictate of right reason or primary justice." Summenhart divides this qualifier into two clauses and first takes up the clause "appropriate to someone" (*conveniens alicui*).

> The third clause, namely, "appropriate to someone," is posited to denote the subject of this defined [entity] that is an accident, for an accident must be defined through its subject if it is defined in the abstract, as is the case here.[29]

The English translation does not convey the terminological choice Summenhart has made here. This is because the Latin expression *conveniens alicui* could equally denote that right is power "appropriate to something" according to the dictate of right reason. Thus, the principle choice to be made is whether the word *alicui* is referring to the subject or to the object of the right; Summenhart's interpretation is that it refers to the subject. Further, his account describes a basic way in which a right is a subjective right. Right is defined through its subject

[29] *Opus septipartitum*, q. 1, sig. A7r: "Tertia clausula scilicet conveniens alicui ponitur ad denotandum subiectum ipsius diffiniti quod est accidens. Accidens enim debet diffiniri per subiectum suum si in abstracto diffiniatur. Et sic fit hic."

like any other accident or property of an individual. In that technical sense, a right is always an individual's right by definition.

Summenhart's interpretation of the expression *conveniens alicui* relates the definition of right firmly to the *suum cuique* principle of justice. According to this ancient principle, "justice is the constant and everlasting will to give each individual one's right (*ius suum*)."[30] The definition of right corresponds to this characterization and specifies further what is meant by *ius* in this context: Right is a proximate power or faculty appropriate to someone according to the dictate of right reason or primary justice. Here the point of departure is that the individual's right is seen as subordinate to the dictate of justice. Rights are derived from the norms of justice, which entails justice being prior to rights. Nevertheless, as far as the definition of right is concerned, "justice" is secondary to "power," since "power" is the genus of right, and its accordance with the dictate of right reason or justice belongs to the *differentia specifica*. This entails that the dictate of right reason or primary justice has an eliminative legal function in the formation of a right. As Summenhart explains:

> The fourth clause, namely, "according to the dictate of primary justice," is put forward to exclude the proximate power that is appropriate to someone by which he can proximately act toward a thing or in a thing, which is not, however, appropriate to him according to the dictate of right reason, as the robber has power by which he can proximately kill a man but, as such, it is not appropriate to him according to the dictate of right reason. And I said "as such" because the power by which he can do that is appropriate to him according to the dictate of right reason, though not with respect to this object and with these circumstances.[31]

Here, the basic meaning of the term "power" is "natural active potency." The dictate of right reason excludes from the sphere of rights all active potencies that conflict with right reason or primary justice. So far, Summenhart's account is straightforward. But when he

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[30] Dig. 1.1.10: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi."

[31] *Opus septipartitum*, q. 1, sig. A7r: "Quarta vero clausula scilicet secundum dictamen prime iusticie, ponitur ad excludendum potestatem propinquam convenientem alicui qua de propinquo potest aliquid agere in aliquam rem, vel in aliqua re, non tamen convenit ei secundum dictamen recte rationis agere, ut latro habet potestatem qua de propinquo potest occidere hominem, sed illa ut talis non convenit ei secundum dictamen recte rationis. Et dixi ut talis, quia potestas illa que id potest quamvis ei conveniat secundum dictamen recte rationis non tamen in ordine ad illud obiectum et cum talibus circumstantiis."

moves on to his example, his writing becomes wordy and complicated. Summenhart's wavering in the case of the robber's power to kill a man implies that when we are discussing man's natural active potencies, the role of the dictate of right reason in the formation of a right is not as simple as was suggested by the opening words in this quotation.

Summenhart's point becomes clear if we recall the explanation that Gerson gave to the same clause in his commentary on the definition of right in *De vita spirituali animae*. Gerson's explanation was firmly rooted in a framework of theological metaphysics. He began by saying that "right reason and its dictate is firstly, originally, and essentially in God."[32] In this sense "right reason" was equivalent to "primary justice," an expression Gerson used to refer to the origin of right in his later work *De potestate ecclesiastica*. Next, Gerson said that "right reason belongs consequently and participatively only to rational creatures."[33] Gerson's explanation of "the dictate of right reason" and its relation to right did not stop with these two (somewhat traditional) characterizations. If "right" signifies an active power that belongs to one according to the dictate of divine right reason, then does this mean that all created active powers are rights? This was Gerson's final conclusion. "Therefore, we say that every positive entity has as much of right thus generally defined as it has of being, and consequently of goodness."

Summenhart's remarks concerning the case of the hypothetical robber can be read as a continuation of Gerson's account. Although Gerson had shied away from applying this general sense of "right" to the political or juridical discourse, the example of the robber indicates that Summenhart did not share these reservations. On the one hand, it is all too plain that the robber does not have a right to kill his victim. On the other hand, the robber's ability to kill is based on his natural faculties and powers, which have their origin in the ultimate (i.e., God's) dictate of reason and justice. This complicates the analysis of the situation, leading Summenhart to state that the robber's power to kill a man does not belong to him "as such," according to the dictate of primary justice. Thus, Summenhart's point is that the robber has a *prima facie* right to actualize his natural potential, but he does not have the right to actualize such a potential in actions that deliberately

[32] Jean Gerson, *De vita spirituali animae*, lectio 3, 26: "Recta ratio & dictamen suum, est primo originaliter & essentialiter in Deo…"

[33] Jean Gerson, *De vita spirituali animae*, lectio 3, 26: "Recta ratio consequenter & participative solum convenit rationalibus creaturis."

and unjustly cause the death of an innocent man. The important point to be noted here is that, by this reasoning, the eliminative legal function is given a secondary role in the formation of a natural right; the law is not needed to justify man's natural powers, which carry the status of a *prima facie* right because of their God-given origin.[34]

2.2. *Right as dominion*

After specifying that Gerson's descriptions of right speak of a right as power, Summenhart makes another elementary supposition.

> The second supposition. Taken in the second sense [i.e., of power] right is the same as dominion and is really and universally predicated of dominion so that every dominion is a right in the second sense, and this shall be proved in two ways.[35]

This is another occasion on which Summenhart uses the expression *est idem quod*, and the meaning of the expression differs yet again from his earlier usage. According to him, right is the same as dominion in the sense that every dominion is a right. The view of dominion as a right was in fact a commonplace in medieval juridical discourse, and Summenhart is clearly affected by this as he continues his account. Without referring to any specific source, he notes that if a person is *dominus* of a thing, this means that formally he has a right to that thing or in that thing. According to him, the conclusion follows from this by reason of the rule *locus a coniugatis*. As another demonstration, he refers to Gerson's descriptions and notes that the clauses in the definition of *ius* are present in the definition of *dominium*, either formally or equivalently.[36]

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[34] Fundamentally, this interpretation is warranted by Summenhart's discussion of the natural right of liberty. See below chapter 2.2.3.

[35] *Opus septipartitum*, q. 1, sig. A6r: "Secunda suppositio, capiendo ius secundo modo est idem quod dominium, et vere et universaliter predicatur de dominio, sic quod omne dominium est ius secundo modo, probatur dupliciter."

[36] *Opus septipartitum*, q. 1, sig. A6v: "Primo quia aliquem esse dominum alicuius rei est formaliter eum habere ius in illa re, vel in illam rem, igitur dominium est ius, tenet consequentia a coniugatis. Secundo probatur, quia diffinitio iuris secundo modo capti convenit formaliter dominio, ut patet discurrendo per omnes tres clausulas diffinitionis iuris, quia omnes iste tres ponuntur etiam in diffinitione dominii formaliter vel equivalenter, unde ut infra patebit in conclusione quarta, descriptiones iuris et dominii in sententia sunt eedem, ergo et diffinita sunt eadem."

What Summenhart has in mind though, appears to be a more complete equivalence of *ius* and *dominium*, in which a right is the same as dominion also in the extended sense that dominion can be predicated of a right. Summenhart recognizes, however, that this is not a universal predication, and therefore, he posits a distinction between the strict sense and a broader sense of dominion.

> However, when I said that right and dominion are the same, it is to be understood that dominion is not taken very strictly and appropriately. For appropriately taken, dominion also connotes supremacy in addition to the sense of right; therefore, that *dominus* is a relation of superiority.[37]

This remark reveals Summenhart's acquaintance with Antoninus of Florence's writing on dominion, for it was Antoninus who explicitly differentiated *dominium* from *ius* on the basis that "dominion, namely, seems to add a certain superiority and authority to right."[38] Summenhart associates this interpretation to "dominion" in the strict sense of the term. When "dominion" is used in the strict or appropriate sense, the term connotates superiority, which the term "right" lacks. Therefore, Summenhart continues, right and dominion "are the same, but not changeably, because right would be in more things and consequently not every right would be dominion." In order to clarify his point, Summenhart refers to three hierarchical relations. He notes that "the inferior has a right over the superior (*in superiorem*) because the superior is obliged to the inferior in many ways." Similarly "the son has a right over the father (*in patrem*)" and "the wife has a right over the husband (*in virum*)." Despite this, "we do not appropriately

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[37] *Opus septipartitum*, q. 1, sig. A6v: "Attamen cum dixi, ius et dominium esse idem intelligendum est si dominium non capiatur valde stricte et appropriate. Nam appropriate capiendo dominium, connotat ultra rationem iuris etiam superioritatem, eo quod dominus est relativum superpositionis."

[38] Antoninus of Florence, *Summa Theologia*, part III, chap. 3, sig. F3v: "Aliquibus autem doctoribus videtur oppositum, et tota ratio est, quia secundum philosophum et simplicium in predicamentis, relatio domini est relatio superpositionis, et immo nullus dicitur habere dominium in aliquo, nisi sit sibi suppositus, sed aliquis non [sic] potest habere ius in aliquo, cui non est suppositus, immo econtra, sicut filius-familias habet ius in patre, similiter servus in domino, quia tenetur eis ad alimentationem…ergo ius et dominium non sunt idem immo secundum istos ius se habet in plus quam dominium quia dominium est ius, sed non omne ius est dominium. Dominium, nam videtur sibi addere ius quandam superioritatem et auctoritatem." See also chapter 1.8. above.

concede that the inferior has dominion over the superior, or the son over the father or the wife over the husband."[39]

As another example of a manner of speaking that does not support the complete equivalence of *ius* and *dominium*, Summenhart points to the language of civil jurisprudence. He notes that in civil law, "*dominium* is less general than *ius*, even when we are speaking of civil rights." The person who holds the right of using a thing (*usus*) or the right of using and enjoying a thing (*usufructus*) "does not have dominion *directum* or *utile*."[40]

Despite these examples, and contrary to the conclusions of Antoninus of Florence, Summenhart defends the complete equivalence of *ius* with *dominium* in which "right" and "dominion" are interchangeable.

> But we do not take it [i.e., *dominium*] that strictly. I shall prove that it could be understood so broadly that it is interchangeable with *ius*, for whoever has a right in a thing can be called the *dominus* of the thing; because of this, that right could be called dominion . . . For whoever has *ius in re*, if that thing is snatched or taken away from him against his will, the taker is said to commit a theft, and if this is true, then the one who seizes takes another man's thing against the will of the *dominus*; the consequence follows from the definition of theft. As a consequence, the one who has a right in the thing could in a way be called the *dominus* of that thing.[41]

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[39] *Opus septipartitum*, q. 1, sig. A6v: "Si igitur ita stricte acciperetur dominium, tunc essent idem, sed non convertibiliter, quia ius esset in plus, et per consequens non omne ius esset dominium. Nam inferior habet ius in superiorem quia superior tenetur inferiori in multis. Et filius habet ius in patrem, quia pater in multis tenetur saltem naturaliter filio. Et uxor habet ius in virum. Et tamen proprie non concederemus inferiorem habere dominium in superiorem, aut filium in patrem, aut uxorem in virum."

[40] *Opus septipartitum*, q. 1, sig. A6v: "Dominium etiam loquendo de civili dominio, esset minus commune quam ius, etiam de civili iure loquendo, quia civiliter loquendo aliquis habet ius in re alique ut usum in utendo re tali vel usufructum, id est ius utendi et fruendi re alique, qui tamen non habet dominium illius rei, nec directum nec utile, ut patebit in q. xii." For Summenhart's discussion of the juridical property rights, see chapter 4.2. and 4.3. below.

[41] *Opus septiparitum*, q. 1, sig. A6v: "Sed ita stricte hic non accipiemus. Quod autem possit ita large accipi ut convertitur cum iure, probo, quia quicumque habet ius in aliqua re, potest dici dominus illius rei, igitur illud ius poterit dici dominium . . . quia quicumque habet ius in re, si ei furriperetur vel subtraheretur res illa eo invito furripiens diceretur furtum commisisse, et si sic, ergo furripiens contrectavit rem alienam invito domino, tenet consequentia per diffinitionem furti. Et per consequens ille qui habuit ius in ea re, poterat aliquo modo dici dominium illius rei."

Here, the major premise of Summenhart's proof is an appeal to intuition. He is suggesting that when a person possesses a juridical right in a thing (*ius in re*), this entails that the thing be placed under his actions in a relationship that is exclusive in nature. Therefore, any intruder who violates his right by taking the thing out of the range of his actions is understood to commit a theft. If this holds true, then Summenhart's conclusion follows directly from the standard medieval definition of theft. Summenhart's proof may not be very successful or convince others who think differently.[42] What is interesting, however, is the general view of property that Summenhart promotes. Summenhart is suggesting, namely, that we are inclined to comprehend economic relations by accepting "dominion" in the broad sense of the term, that is, we analyze property relations in terms of the actions that men are able to exercise in regard to their things and ignore the socio-political hierarchical context in the background.

2.2.1. *Right as dominion in Gerson's descriptions*

A central part of Summenhart's conceptual work is to verify the equivalence of *ius* and *dominium* in terms of Gerson's definitions. Summenhart focuses on the controversial part of the equivalence, that is, he endeavors to show that Gerson had defined dominion in a way that corresponds to the broad sense of *dominium*, which is equivalent to *ius*. In terms of the definitions, this leads to the conclusion that "all the clauses that are posited in this description of *dominium* are also posited in the description of *ius*, either expressly or implicitly."[43] The definition of *dominium* that serves as the starting point for Summenhart's demonstration is the following:

> Dominion is a proximate power or faculty of assuming other things [or as another] into one's faculty or licit use according to rights (*iura*) or rationally instituted laws.[44]

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[42] See Tierney 1997, 244–245.

[43] *Opus septipartitum*, q. 1, sig. A8r: "Quarta conclusio, omnes clausule posite in descriptione dominii, sunt etiam posite in descriptione iuris, et hoc vel expresse vel implicite, probatur discurrendo per quinque clausulas descriptionis dominii."

[44] *Opus septipartitum*, q. 1, sig. A6r: "Dominium autem est potestas vel facultas propinqua assumendi res alias in sui facultatem vel usum licitum secundum iura vel leges rationabiliter institutas."

This is not exactly identical to Gerson's original definition.[45] Gerson posited "power" as the genus term for dominion. To this, Summenhart has added the expression "or faculty" that contributes to the similarity of *ius* and *dominium*.[46] As far as the genus "faculty and power" and the differential attribute "proximate" are concerned, Summenhart is able to justify the equivalence simply by pointing out that these appear equally in the definition of *ius*.[47]

On this point, it may be useful to observe that Gerson himself did not explicitly maintain that *ius* and *dominium* were equivalent.[48] In a way, this is mirrored in Summenhart's account, since in demonstrating the equivalence Summenhart makes no reference to Gerson's text. On the other hand, Gerson's definitions are not at odds outright with Summenhart's interpretation. For one thing, Gerson's definition of dominion does not associate dominion with any apparent hierarchical connotation, nor is the definition characteristically juridical. In this sense, the definition is not in opposition to the broad sense of dominion Summenhart is promoting. Further, as far as the genus is concerned, the definition does not explicitly posit *dominium* as a species of *ius*, but rather, *dominium* seems to have the same genus as *ius* (at least with Summenhart's additions.) It goes without saying that this is required of the equivalence of *ius* and *dominium*.

Summenhart's project culminates in the remaining clauses of the definition of dominion. His view is that the clauses "of assuming other

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[45] Gerson, *De potestate ecclesiastica*, consideratio 13, 252: "Dominium, est potestas propinqua assumendi res alias, vel ut alias in sui facultatem vel usum licitum, secundum Jura vel Leges rationabiliter institutas."

[46] Of the later theorists, Soto and Vitoria repeated Summenhart's version of the definition, which indicates that they had read Gerson through Summenhart. Likewise, they maintained that Gerson promoted the equivalence of *ius* and *dominium*. See Seelmann 1979, 84; Feenstra 1978, 216–217; Brett 1997, 35.

[47] *Opus septipartitum*, q. 1, sig. A8r: "Nam prima et secunda sunt facultas vel potestas et propinqua, et he due etiam sunt posite in descriptione iuris ut patuit." Another move in the same direction was Summenhart's explanation that here the term *iura* (i.e., *ius* in the plural form) is to be taken in the sense in which it means law. This reading simplifies the description of *dominium; dominium* falls to its subject according to rationally made laws. *Opus septipartitum*, q. 1, sig. A6r: "Uno modo prout idem est quod lex…Et hoc modo accipitur ius in descriptione dominii cum dicitur secundum iura etc." There is also another difference; Summenhart has omitted the phrase "or as another" (*vel ut alias*) from his definition. However, this seems to be a printing error, since Summenhart's analysis treats the definition as if the phrase were included. I will discuss this difference below.

[48] Cf. Tuck 1979, 28.

things in one's faculty or licit use according to *iura* or rationally made laws" are implicitly posited in the description of *ius* when it is said to be "appropriate to someone according to the dictate of right reason or primary justice." Irrespective of the verbal appearance, there is a more challenging disparity between the two definitions. In the definition of dominion, these remaining clauses qualify the exercise of power and not the power itself as in the definition of right. Thus, whereas right was defined as power, the definition of dominion takes a further step and specifies the actions for which dominion is the power. In that way, Gerson's definition of dominion seems to be leaning toward the conclusion that *dominium* is a species of *ius*, which is contrary to what Summenhart argues.

Summenhart's solution is based on his interpretation of the genus term "power or faculty." This emerges in his interpretation of the clause "of assuming things in one's faculty or use." Summenhart explains that the clause "of assuming things, etc." is already implicit in the genus term "power or faculty." He remarks that "faculty or power" denotes potency, not passive potency, but rather potency as a "principle of acting" (*in ratione agendi*). From this it follows that *ius* is a "proximate power of acting something toward that thing or in that thing."[49] In order to clarify this view, Summenhart turns to his conception of right as a relation, and we shall discuss his explanation in detail in the next chapter. The basic point here is that the term "faculty or power" does not merely imply action and the object, but the relation is even more specific and stronger. His point seems to be that "faculty or power" cannot be understood without making reference to the action and the object. This justifies his interpretation of the clause "of assuming things etc."

> Whence everyone has as much right or dominion over a thing as it is licit for him to exercise actions in regard to the thing. And the action that is exercised in regard to the thing is implied in the third clause when it is said "of assuming things etc.", that is, of exercising some actions with regard to the thing.[50]

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[49] *Opus septipartitum*, q. 1, sig. A8r: "Tertia est assumendi res etc. Et hec implicite etiam est posita in descriptione iuris. Nam potestas vel facultas que ponitur loco generis in descriptionibus predictis denotat potentiam non passivam, sed potius habentem se in ratione agendi et per consequens ius erit potestas propinqua ad agendum aliquid in illam rem vel in illa re."

[50] *Opus septipartitum*, q. 1, sig. A8r: "Unde tantum quisque habet iuris vel dominii in aliquam rem, quantum actionis licet sibi exercere circa rem. Et actio circa rem

Summenhart's point is thus that the clause "of assuming things into one's faculty and use" does not mean anything other than "of exercising some actions with regard to the thing," which, however, is already indicated by the genus term "faculty or power."[51]

The specific interpretation of "power or faculty" conditions Summenhart's discussion of the normative qualifications, which appear in the definition of dominion. He notes that the fourth clause is mentioned in the word "licit" and the fifth with the words "according to laws, etc." According to him, these two clauses are "adequately implied" in the definition of *ius* in the clause "appropriate to someone according to the dictate of primary justice or right reason."[52]

> For if some power of exercising some licit actions in regard to a thing is appropriate to someone according to rationally instituted laws, then the consequence is that it also is appropriate to him according to the dictate of right reason and primary justice, and conversely, because every rationally instituted law is a dictate of right reason, taking dictate passively, as expression (*oratio*) or sentence (*complexio*) dictated by reason.[53]

Here, Summenhart ignores the difference in the definition of *ius* that the normative qualification was related to "faculty or power" whereas in the definition of dominion the normative clauses qualified the action instead. However, if one accepts Summenhart's interpretation, that "faculty or power" cannot be understood correctly without reference to the action, then this difference seems to become irrelevant.

2.2.2. *Dominion by agency*

In making a distinction between the strict and the broad sense of *dominium* and claiming that the latter is equivalent to *ius*, Summenhart was

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exercenda innuitur in tertia clausula cum dicitur assumendi res etc., id est exercendi circa illas res aliquas actiones."

[51] The expression "exercise actions" seems to derive from the language of Antoninus of Florence. It does not refer to juridical actions that are exercised in the court, but instead to the actualization of a potency. See chapter 1.8. above.

[52] *Opus septipartitum*, q. 1, sig. A8r: "Quarta clausula tangitur cum dicitur licitum. Et quinta, cum dicitur secundum leges etc. Et he due etiam satis innuuntur in tertia clausula diffinitionis iuris cum dicitur, conveniens alicui secundum dictamen prime iusticie vel recte rationis."

[53] *Opus septipartitum*, q. 1, sig. A8r: "Nam si aliqua potestas exercendi aliquas actiones licitas circa rem, convenit alicui secundum leges rationabiliter institutas, tunc consequens est ut etiam sibi conveniat secundum dictamen recte rationis et prime iusticie, et econtra, quia omnis lex rationabiliter instituta est dictamen recte rationis, capiendo dictamen passive, pro oratione vel complexione dictata per rationem."

not introducing a novelty into medieval legal discourse. In jurisprudence this conceptual arrangement had been recognized at least since the middle of the fourteenth century when the Italian lawyer Bartolus Saxoferrato (1314–1357) laid out the concept.[54] However, the meaning that Summenhart attributes to the term "dominion" in this broad sense can be regarded as special. As has already become apparent, above all in his discussion of Gerson's definitions, Summenhart understands the concept of dominion to correspond to the signification of the concept of a right. Consequently, at the heart of Summenhart's interpretation is the idea of dominion by agency: "everyone has as much right or dominion over a thing as it is licit for him to exercise actions in regard to the thing." This idea of dominion as a relation of action was not without its parallels in medieval thought, but the parallels were found, not in jurisprudence, but in the language of natural philosophy.[55]

It is not too difficult to find a medieval author who, in describing a natural phenomenon, associated dominion with agency in a way that comes close to Summenhart's concept of dominion. As an example, we may single out Thomas Aquinas who, in a chapter from his unfinished *Compendium theologiae*, used the term "dominion" to determine the relation between a mover and the thing that is moved. Aquinas wrote that "in order to move a thing, the mover needs to have dominion over that thing."[56] Another example can be found in John Buridan's commentary on Aristotelian ethics. In describing the inner dynamics of human will, Buridan commented that an "agent is said to dominate the patient."[57] There is thus a relation of dominion between the agent and the patient. A similar reference can be found in John Wyclif's *De dominio divino*. In his first chapter, Wyclif began the inquiry into the concept of dominion by introducing a philosophical

[54] In speaking of property titles, Bartolus of Saxoferrato had recognized the distinction between the strict and general senses of *dominium* and suggested that in the general sense *dominium* can be associated with every *ius in re*. Bartolus's views, which were probably a summation of a current consensus, became very influential, and it is probable that Summenhart was acquainted with Bartolus's terminology. Summenhart does not, however, refer to Bartolus in this context. For Bartolus's terminology, see Coing 1953.

[55] Summenhart's interpretation was a departure from the traditional theological conception of dominion. Seelmann 1979, 81; Brett 1997, 40.

[56] Aquinas, *Compendium theologiae*, pars 1, caput 17, 18: "Oportet omne movens, ad hoc quod moveat, dominium super rem quae movetur, habere…"

[57] Buridan, *Questiones super X libros Aristotelis ad Nichomachum*, liber X, fol. 257 v: "…et agens dicitur dominari super passum…"

view of dominion in which "every physical agent is said have dominion over the patient." At the same time he explicitly remarked that this usage of the term "dominion" is typical of philosophers, and thus made it known that "dominion" is used differently by theologians and other moral theorists who operate in the framework of the normative language of rights.[58]

It can be said that Summenhart introduces the "dominion" of natural philosophy into the discourse on rights, yet retains the normative connotation of "dominion" characteristic of the language of rights. As such, "dominion" appears to be an extension of Gerson's language of rights. Summenhart's *dominium*, like Gerson's *ius*, could be used to characterize phenomena discussed in natural philosophy, such as animal activity and physical motion in natural phenomena, from the normative point of view. What justifies this terminological usage is the framework of theological metaphysics. A good example of Summenhart's approach is his explanation of the right or dominion that is possessed by heavenly bodies:

> For heavenly bodies have the right of exercising various actions with respect to those beneath them (*inferiori*), concerning motion, light, and influence; this right of theirs is called dominion, which is appropriate to them on the grounds of natural gifts, which are given by God.[59]

This example, derived from medieval cosmology, is emblematic of Summenhart's interpretation of dominion. The phrasing of the case is striking; Summenhart makes use of a hierarchical association in which dominion is seen as a relation of the superior to the inferior; the similar phrasing would fit in perfectly with the hierarchical scheme that describes the king's dominion over his subjects or the rational being's dominion over inferior creatures. However, the fact that Summenhart is speaking here of the dominion possessed by celestial bodies breaks down all associations with essential or political superiority. It is clear

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[58] John Wyclif, *De dominio divino*, capit. 1, 2: "Dicitur enim apud philosophos omne agens vel faciens suum passum subici, de tanto pacienti huiusmodi dominari. Sic enim secundum naturales omne agens phisicum se habet in dominio ad suum passum."

[59] *Opus septipartitum*, q. 6, sig. C6r: "Corpora enim celestia habent ius varias actiones exercendi in hec inferiora, motu, lumine, et influentia, quod eorum ius dicitur dominium conveniens eis ratione naturalium donorum, eis a deo communicatorum…" Summenhart's writing here is directly related to a tenet of Aristotelian cosmology, namely that the celestial bodies causally affect all material bodies on earth. For this tenet in medieval cosmology, see Grant 1996, 569–617.

that in this case, superiority is merely spatial, without any connection to the metaphysics of essence to any degree. The relation of dominion is defined by the action that celestial bodies are to exercise over those beneath them. Dominion is a relation between the one who acts and the one who is acted upon. Yet, "dominion" is a normative term that is indicated by Summenhart's reference to the God-given nature of dominion and its foundation.

The equivalence of *ius* and *dominium* is the particular aspect of Summenhart's language of rights that has received the most attention in modern scholarship. Richard Tuck took Summenhart's right-dominion equivalence as a representative of "an active right theory, in which to have any kind of right was to be a *dominus*, to have sovereignty over that bit of one's world."[60] As Annabel Brett has correctly pointed out, Tuck's interpretation is misleading; for Summenhart, the equivalence of right and dominion presupposed that "dominion" is taken in a broad sense that does not connote any superior status or "sovereignty."[61] At the same time it has to be said that the attention paid to the equivalence of *ius* and *dominium* was not unwarranted, for it seems clear that the general rationale for this equivalence is that a right means a kind of dominion. As noted above, it is characteristic of Summenhart that he defines this domination in terms of action, which enables him to attribute dominion to animals and even inanimate creatures as well as to humans. This feature seems to have been left unmarked by Tierney, who finds confusion in Summenhart's language. According to Tierney, Summenhart made a sharp distinction between the right possessed by irrational creatures and the right inherent in humans: "Only in humans did *ius* designate a liberty, a freedom of action." Yet "Summenhart's application of the same terms, *ius* and *dominium*, to both irrational and rational creatures perpetuated a confusion concerning the proper meaning of these words."[62] However, contrary to what Tierney claims, there is no confusion in Summenhart's language. For Summenhart, *ius* or *dominium* does not necessarily imply any freedom of action, not even in the context of the rights possessed by human beings. It is true, though, that the concept of liberty has a relevant place in Summenhart's language of rights,

[60] Tuck 1979, 28.
[61] Brett 1997, 38.
[62] Tierney 1997, 248–249.

as will be shown in the following chapter. Although the concept of a right does not imply liberty, Summenhart is able to use that concept to promote a liberty-based approach to rights.

2.2.3. *The natural right of liberty: Dominion over oneself*

Gerson's definition of dominion included one clause that did not appear in Summenhart's version. This was the minor qualification that the object of dominion is "other things or as another" (*res alias vel ut alias*).[63] Summenhart's version stated merely "other things" and did not include "as another." However, this omission may have been unintentional, for in defending his definition of dominion, Summenhart acts as if the clause "as another" were included. His explanation for this clause leads to interesting conclusions and reopens the discussion on natural rights and powers.

In Question 1, Summenhart's fifth conclusion is that the definition of dominion is good. His proof for this conclusion rests heavily on earlier explanations. According to him, *ius* and *dominium* as well as their definitions were previously shown to be the same. Because the validity of the definition of *ius* was demonstrated, the conclusion that follows is that the definition of *dominium* is also good or valid.[64] Yet, Summenhart also recognizes that in the definition of dominion, there is one clause that deserves special attention, namely, "other things or as another." According to him, the rationale for this characterization lies in the fact that "occasionally someone has dominion or right over a thing which, however, is none other than the *dominus* itself."[65]

Summenhart clarifies this situation with examples. First, he notes that 'the soul has dominion over its lower potencies, which are the soul itself.' Yet Summenhart observes that the soul has this dominion

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[63] Gerson, *De potestate ecclesiastica*, consideratio 13, 252: "Dominium, est potestas propinqua assumendi res alias, vel ut alias in sui facultatem et usum licitum, secundum Jura vel Leges rationabiliter institutas."

[64] *Opus septipartitum*, q. 1, sig. A8v: "Quinta conclusio, descriptio dominii est bona, probatur dupliciter. Primo per conditiones bone descriptionis. Secundo, quia descriptio dominii est eadem cum descriptione iuris ut patet per quartam conclusionem, et diffinita etiam sunt eadem scilicet ius et dominium, ut patuit in secunda suppositione. Igitur si descriptio iuris fuit bona, ut patuit in prima conclusione, sequitur propositum. Et hec descriptio etiam potest declarari eodem modo, quo declarata est descriptio iuris per singulas clausulas."

[65] *Opus septipartitum*, q. 1, sig. A8v: "Illa tamen clausula scilicet res alias vel ut alias, speciali indiget declaratione que ponitur ideo, quia aliquando aliquis habet dominium vel ius in aliquam rem que tamen non est alia ab ipso domino."

as if it were over another thing. Also Summenhart notes that the soul as the will has dominion over itself to change from passive to active.[66] In his second example, Summenhart explains:

> Similarly, *libertas* is a species of right, and a free person has this right over himself, namely, of acting as he likes. Whence that right is defined in *Institutes, de iure personarum*, § 1, as one's natural faculty to do what one wants, unless it be prohibited by force or law. And so a free man has a right over his own person, although he is not the *dominus* of his members in order to cut them off or otherwise abuse them, as will be discussed in Questio 74.[67]

The connection between dominion and liberty was generally recognized in medieval thought, and the concept of *dominus* was often employed in describing man's inherent metaphysical liberty, which marked him as special among God's creations.[68] Summenhart's first example, which concerned the dominion of the will, shows that he shares this viewpoint. However, by *libertas* Summenhart means not any metaphysical liberty, but the freedom of action or self-mastery in human society. At it center is Summenhart's interpretation of a Roman definition of liberty originally introduced by the Roman legal writer Florentinus.[69] Summenhart's interpretation is that in *libertas*, Roman

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[66] *Opus septipartitum*, q. 1, sig. A8v: "Exemplum. Anima habet dominium super suas potentias inferiores que sunt ipsa anima, et sic anima super seipsam habet dominium. Attamen anima habet illud in se quasi et quodam modo ut in aliam rem, quia anima secundum quod voluntas est, habet dominium in se secundum alias potentias. He autem potentie ab invicem distinguuntur aliquo modo. Et anima etiam secundum quod voluntas habet dominium in seipsam secundum quod voluntas seipsam transmutando de non agere ad agere, sed hoc est in seipsam ut passivam a seipsa ut ab activa."

[67] *Opus septipartitum*, q. 1, A8v: "Similiter libertas est quedam species iuris et illud ius habet liber in seipsam scilicet agendi quod libet. Unde diffinitur ius in institutis de iure personarum, § 1. Est naturalis facultas eius quod cuique facere libet nisi quod vi aut iure prohibetur. Et sic liber habet ius super suam personam quamvis non sit dominus membrorum suorum ad ea abscindendum, aut ad alium abusum de quo diceretur in questio lxxiiii."

[68] Man was free; he was *dominus* of his actions. Other earthly creatures were not free; they acted naturally, in the sense of acting of necessity. See e.g., Thomas Aquinas, *Summa theologiae*, 1a2ae, a.1, resp.

[69] See Inst. I, 3. Summenhart quotes the definition in its medieval wording. For the idea of *libertas* in Roman law, see Wirszubski 1950. This definition also had a history of interpretation in the medieval juridical discourse. During the commentary process on *Corpus Iuris Civilis*, medieval lawyers had understood Florentinus's definition to pertain to the civil liberty of man. According to a commonly held opinion, *libertas* consisted both of a factual element (a natural faculty with factual restrictions) and a legal element (a licence with legal restrictions). The two aspects of *libertas* were

law documents and recognizes man's natural right of liberty. It may be useful to note, as Brett has correctly pointed out, that for Summenhart, rights are not liberties, but liberty is a species of rights.[70] It is apparent, though, that *libertas* is not just a species of rights among others, but instead, manifests Summenhart's liberty-based approach to rights, which we have already noted. Summenhart's interpretation of *libertas* makes explicit this principle, which was built into the Gersonian line of thinking about rights.[71] It is striking how well Florentinus's definition fits into Summenhart's (Gersonian) reasoning, by which the God-given ability to do something entails a *prima facie* right of doing that very thing. According to Summenhart, man has a natural right or dominion of doing whatever he is able unless a just law prohibits that particular action.

Summenhart's treatment of *libertas* can be regarded as a two-fold theoretical success. First, Gerson's idea of the general natural rights of all beings is embedded in a concept of liberty that enters the political scene as a far-reaching moral principle. Second, the specification of Florentinus's definition of *libertas* provides the natural right of liberty a solid foothold in the distinctively juridical discussions. In other words, the principle of the natural right of liberty is formulated in juridical language, which makes it useful for analyzing human actions in civil society.

Within the medieval juridical way of speaking, the concept of dominion was associated with ownership. Summenhart's account verifies this. In the quotation above, while he approaches liberty as self-dominion he qualifies this idea. He admits that a free person is "not *dominus* of his members in order to cut them off or otherwise abuse them." This is a reference to a chapter of the *Digesta* in which, in speaking of the free men, Ulpian concluded that "no one has ownership (*dominium*

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described by the first glossator Irnerius (c. 1050–c. 1130) in the following way: "Duplex est hec naturalis facultas: nam et posse mihi largitur quasi de facto et licenciam dat pro modo iuris, dupliciter ergo excipitur: in eo enim quod facti est facto, idest vi resistitur ei: in eo enim quod iuris est non videtur tacite permissum quod vetitum est nominatim." quoted in Weigand 1967, 67. For glossators' interpretations of *libertas*, see Weigand 1967, 64–78. Summenhart's novelty seems to be in interpreting *libertas* simply as a natural right.

[70] Brett 1997, 34, 42.

[71] To my view, this point has not been correctly understood by modern scholars. Cf. Seelmann 1979, 81; Brett 1997, 41–43; Tierney 2006, 183–185.

directum) over one's members."[72] Summenhart follows up this idea by referring to the right of abusing (or disposing of the thing), which in medieval jurisprudence belonged to the distinctive characteristics of ownership. The conclusion seems to be that man's natural right of liberty or his natural self-mastery is not equivalent to self-ownership. However, it should be noted that this is not Summenhart's final word on the issue. To end his discussion of the example of *libertas*, he refers to Question 74 for a fuller treatment. There defends the idea of liberty as self-mastery or self-ownership.[73]

Redditus in persona

The seventy-fourth *Questio* belongs to the fourth tract, which is comprised of questions related to the contract called *redditus* or *census*. The *redditus* or *census* (also known as *rentes*) was a genuine medieval contract in which the buyer purchased usufruct to the seller's real property. In return for a single payment, the buyer received an annual income (*redditus*) for the rest of his life or even for the lives of his heirs. Although the sale of *redditus* might formally be categorized as a sale, in practice it was both a loan and an investment. For the buyer, it was a profitable way to invest money, because the total sum of the annual income was expected to exceed the amount of his original payment. For the seller, it was a way to borrow money, although in the typical case, the seller was to pay back more than the original capital. It was the use of *redditus* in financing both public and private enterprises that made the contract morally suspicious in the eyes of the Catholic Church. This was because loaning money with interest, i.e., usury, was a sin and a crime expressly prohibited by canon law. Although usury was occasioned by definition in the contract of a loan (*mutuum*), the fact that the sale of *redditus* seemed in practice to count as a loan with interest cast moral suspicion on the contract, especially the variant called *redditus in persona*. Here the income was not fixed to the profit

[72] Dig. 9.2.13: "pr. Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur. Fugitivi autem nomine dominus habet."

[73] In medieval discourse human self-mastery was not usually understood as a property right. Brian Tierney considers Henry of Ghent to be a rare exception. See Tierney 1997, 83–89. For a slightly different view, see Brett 1997, 10–20. Brett claims that certain thirteenth century mendicant theorists did "equate internal liberty, property in oneself, power over oneself, *dominium* of oneself." Brett 1997, 16. For Summenhart's treatment of *libertas*, see also Tierney 2006, 183–185.

of any real property. Instead, the seller was personally obliged to provide *redditus* to the buyer.[74]

Summenhart's discussion covers both variants of *redditus*. He begins the tract in Question 72 by discussing the licit quality of the contract *redditus in re*.[75] In Question 74 his discussion moves to inquiring into the legality of *redditus in persona*. Summenhart asks whether it is licit for a single human being to constitute *redditus* in his person for another in return for a payment.[76] As Summenhart's phrasing indicates, the contract of *redditus* or *census* was taken to consist of two parts: the constitution and the transference in return for a payment. But what was actually sold in *redditus*? Since the end of the thirteenth century, it was customary to conceptualize *redditus* as a contract for the sale of a right, and Summenhart treats *redditus* in that way.[77] So the issue here is whether it is licit for a person to constitute a

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[74] Munro 2003, 518–524; Noonan 1957, 154–164.

[75] *Opus septipartitum*, q. 72, sig. A1r: "Utrum alicui liceat in re sua constituere alteri redditum fructuarium utputa bladi vini vel alterius rei utilis, de redditu autem pecuniario in lxxv questione queritur."

[76] *Opus septipartitum*, q. 74, sig. B2r: "Utrum liceat alicui homini singulari et etiam communitati hominum, in se vel sua persona constituere alteri redditum alicuius rei utilis." Here, Summenhart makes a distinction between the transitive and the intransitive meanings of the expression "one's person." In the intransitive sense "one's person" means the person himself, whereas in the transitive sense 'one's person' is not the person himself but another person; for example a slave is his master's person. Summenhart posits distinct conclusions for these two cases, but his argument is centered around the intransitive sense of "one's person." There is also a parallel question and conclusion concerning human community, which is thus compared to human person. Summenhart reaches a similar conclusion in that case.

[77] The question of the licit buying and selling of *redditus* was drawn into the circles of academic discussion by Henry of Ghent (d. 1296) at the end of the thirteenth century. Godfrey of Fontaines (d. 1306), who was Henry's pupil at the University of Paris, seems to have been the first to treat the case as a question of purchasing a right to money rather than as a question of purchasing money. As far as Godfrey was concerned, the matter culminated in the question of the just price: could it be licit to buy and sell incorporeal things, namely, revenue rights, which seem to be difficult to give a monetary value? According to Godfrey, *redditus* can be seen as an incorporeal thing that can be purchased licitly only if a just price is paid. When *redditus* is sold for life (*redditus ad vitam*), it is impossible to estimate the price exactly. Godfrey remarks that it is sufficient that the price and the thing are estimated to be of equal value with the accuracy that 'can be found jointly and easily by those who are willing to buy the thing.' Godfrey of Fontaines, *Quodl.*V, Q. XIV, 65: "Ergo videtur quod possit dici in proposito quod redditus ad vitam, sive in pecunia, sive in quacumque re alia, sit ius quoddam percipiendi pecuniam vel talem rem, et est quid incorporale aliud ab ipsa re corporali. Quamvis ergo pecunia secundum se non sit emibilis, tamen ius percipiendi pecuniam vendi potest…"; Ibid., 66: "…et iustum videtur quod illa pecunia adaequetur illi rei secundum modum secundum quem communiter et faciliter inveniri possint qui emere velint."

right in his person and transfer this right to another person in return for payment.

Summenhart's discussion of this question shows a confrontation between two opposing views: the opinion that considers *redditus in persona* as illicit and the view that considers the contract licit. By using this approach, Summenhart is following his predecessors in the *De contractibus* literature. The confrontation between the opposing views had been outlined by Henricus de Hassia (1325–1397) in his *De contractibus* written at the end of the fourteenth century.[78] Whereas de Hassia was hesitant in his judgment of the licit quality of *redditus in persona*, his contemporary Henricus Totting de Oyta (1330–1396) defended the affirmative view. Summenhart seems to have used Totting's *De contractibus* as his source, for some of the arguments he uses appear in Totting's text. Like Totting, Summenhart takes an explicitly positive stand on the licity of *redditus in persona*.[79]

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[78] Heinricus de Hassia, *De contractibus*, Secunda pars, de origine censuum, capitula 4, sig. 207b: "Si queratur an census possunt constitui in persona hominis vel in communitate hominum. Respondetur quod si servitus est iusta secundum aliquem modum ut quibusdam videtur utique dominus potest constituere alicui censum in servo quem emit iuxta quantitatem utilitais quam servus ille pro annum facere potest et hoc eadem rationem quam potest censum ponere in alio animali utili quod suum est ut in vacca asino vel equo. An vero homini libero qui est sui iuris vel libere communitati hominum liceat se censualem constituere alteri homini vel communitati. Dubium habem. Cum quibusdam videatur quod non, eo quod ex naturali conditione et originali dignitate homo sic liber est quod nec ipse se nec alius ipsum iuste servilem facere potest nisi in penam peccati. Aliis videtur quod homo potest licite se ipsum obligare quamdiu vixerit et laborare poterit ad reddendum aliteri homini vel alicui ecclesie aut capelle annualiter aliquam partem pecunie iuxta quantitatem lucri quod ex suo labore per annum adquirere potest et consuevit, hoc autem quid aliud est quam constituere in se ipso censum annualem pro parte vite sue."

[79] Heinricus Totting de Oyta, *De contractibus*, sig. 228 a: "Dixi etiam aut persona. Aliqui tamen vertunt hoc in dubium dicentes quod redditus constitu non possint in persona. Puta quod persona obligetur ad soluendum redditus aliquis non referendo ad rem aliam certam de que redditus haberi possunt. Et rationem reddunt quia in tali obligatione non res sed persona libera obligatur, que obligari vel pignerari non potest. Sed contra persona libera potest in servitutem redigi et in obsidem poni igitur persona libera potest obligari igitur et impignerari, censequens tenet cum reductio in servitutem magna sit obligatio et obsidis positio, vera sit impigneratio…Item homo quantumcumque liber ad tempus vel ad vitam suam totam saltem quamdiu de suo laborem vel industria ultra suam necessitatem tantum vel tantum potest residuare, obligare potest se ipsum ad hoc quod soluat alteri homini vel alicui monasterio vel ecclesie aut capelle vel hospitali etc annuatim aliquam certam summam pecunie puta libram unam vel incertam puta quartam vel quintam vel consimilem partem illius quod ex suo personali labore artificio vel industria omni anno adquisierit hoc autem ipsum est constituere censum vel redditum in persona sua. Quod autem hoc licite aliquis facere potest, nullus rationalis homo vertat in dubium." The treatises Henricus

There is, however, one important difference between Summenhart and both the Henricuses. Summenhart approaches the case of *redditus in persona* as an opportunity to analyze and define the limits of the natural right of liberty (*libertas*) in civil society. This is a significant feature. In the case of *redditus in persona*, Summenhart uses the principle of *libertas* to resolve a moral question that was still controversial and officially unsettled by the church.[80]

First, Summenhart reviews the opinion that suggests a negative answer to the question at hand. Accordingly, it is claimed that man cannot licitly establish *redditus* in his own person. The following reasoning is used to justify this position:

> Because a free person cannot be obligated as is manifest [in the title] *De pignoribus,* chapter 2 [of *Liber extra*]. Now, if someone who is free constituted *redditus* in his person, then his person would be obligated, because to every right corresponds an obligation, but *redditus* which someone has over himself is a right; therefore, that person would be obligated to that [other person].[81]

After introducing this mode of thought, Summenhart attempts to refute it. He presents seven counter-examples to demonstrate that a free person can be obligated in various ways within the civil legal system. He begins by noting that someone can have personal civil actions against a free person. And because every action has a corresponding obligation, this means that the free person becomes obligated. Next,

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de Hassia and Henricus Totting de Oyta are included in Koelnhoff's 1484 edition of Gerson's *Opera*. It is possible that Summenhart was using this particular edition.

[80] The moral and legal suspicions of the licity of the sale of *redditus* were significantly abolished in the early fifteenth century, when the Council of Constance, followed by the Papacy, took their stands in favor of the contract. Three papal bulls were released, which declared that the contract of *census* or *redditus* was fully licit under specified conditions. The papal blessing, however, only concerned *redditus in re* and did not cover *redditus in persona*. The question of the licity of the sale of *redditus in persona* retained its status as a morally controversial question, and as such it entered into Summenhart's discussion at the end of the century. Summenhart's defense of *redditus in persona* has been valued as historically significant in that it lent a strong impetus to the gradual demise of the usury ban in the European economy, especially in the German region. See Munro 2003, 518–524; Noonan 1957, 233–235.

[81] *Opus septipartitum*, q. 74, sig. B2v: "…quia persona libera non potest obligari, ut patet extra de pignoribus, ca. ii. Modo si quis liber existens in sua persona constitueret redditum, sua persona obligaretur, quia omni iuri correspondet obligatio, redditus autem quem quis super ipsam haberet esset ius, igitur illa persona esset illi obligata." See *Liber extra* 3.21.3. Summenhart immediately refutes this view: "Sed ille modus dicendi est falsus, et eius motivum invalidum quorum utrumque patebit per rationes secundi modi dicendi." *Opus septipartitum*, q. 74, sig. B2v.

Summenhart lists examples of contractual situations that also put the free person under obligation if he enters into them. Finally, as the seventh example, Summenhart takes up slavery, which according to him "is a kind of great obligation." Summenhart argues that "a free person can become a slave, and this [can take place] in two ways: involuntarily and also willingly."[82] As an example of involuntary enslavement, Summenhart refers to the Roman legal practice by which a soldier captured by the enemy during war will become the slave of his captors.[83]

It is voluntary slavery, however, that is of primary relevance to his case. Summenhart sets out to defend the claim that a free person can sell himself into slavery. With this claim Summenhart finally confronts the genuine intentions of the view he is trying to refute. The above the argument based on canon law evidently did not claim that a free person could not be subject to a civil obligation of any kind. Needless to say, this would be absurd. The real intention of the clause *persona libera non potest obligari*, coupled with a reference to a chapter that deals with pledges, is to argue that a free person cannot be subject to an obligation that will treat him or her as a thing instead of a person. This is precisely what *redditus in person* would do; it would transform *personam liberam* into a thing, *res*. In canon law (as in civil law) this would be untenable.[84]

Summenhart's argument for voluntary slavery shows that he is ready to accept the view that *redditus in persona* is conceptualized according to the model of *redditus in re*. In this consideration what is sold in *redditus persona* is the property right in a freeman's person. Thus, Summenhart's strategy in defending the licit status of *redditus in persona* is to argue that the freeman may even sell himself into slavery, which clearly exceeds the obligation arising in *redditus in persona*, and counts as the ultimate way of treating one's own person as a

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[82] *Opus septipartitum*, q. 74, sig. B2v: "Septimo, servitus est quedam magna obligatio…Modo persona libera potest fieri servilis, et hoc dupliciter scilicet invita et etiam volens…"

[83] Summenhart is referring to a practice acknowledged in jurisprudence. *Opus septipartitum*, q. 74, B2v: 'Nam liber captus in bello ab hostibus, id est ab inimicis romani imperii, efficitur ipso facto secundum leges imperiales servum capientium, ut patet in l. hostes, Digesta, de cap. et postli. rever., quod etiam adeo intelligunt legiste quod ille captus efficiebatur servus, etiam si pars capientium foveret bellum iniustum et captus esset de parte fovente bellum iustum.' See Dig. 49.15.1.

[84] In Roman law there was a clear, structural distinction between *persona* and *res*. The status of a slave was an exception: *servus* was considered both a thing and a person. See e.g., Thomas 1976, 389–401.

thing. This argument also works as the foundation for Summenhart's inquiry into the extent of human liberty in civil society for, as we have seen, he conceptualized individual liberty as dominion over oneself, and dominion over oneself is the prerequisite for a freeman selling himself into slavery.

Liberty as self-ownership

Having established the argument that a free man can sell himself into slavery, Summenhart defends his view against four counter-arguments. The third and fourth are especially interesting in that they operate within distinctively juridical language in which dominion is characterized as ownership. The third counter-argument is the same to which Summenhart refers in explaining the definition of *libertas* in Question 1, so here it is the occasion to continue his earlier discussion. This argument addresses Summenhart's position at its roots by denying the very notion that man is *dominus* of himself.

> No one is *dominus* of his members, as is said in the law *Liber homo* in the title *Ad legem Aquiliam* of *Digesta*. Therefore, much less could he be *dominus* of his person. Therefore, no one could sell his person—for the one who sells the thing is the owner, at least if he delivers the thing in the way in which delivery leads to the passing of ownership—because no one can transfer to others more rights than one has oneself.[85]

Again, it becomes apparent that in juridical language, the idea of self-mastery includes the claim of self-ownership.[86]

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[85] *Opus septipartitum*, q. 74, sig. B3v: "Nemo est dominus membrorum suorum ut dicitur in l. liber homo, Digesta, ad legem aquiliam, igitur multo minus nec erit dominus persone sue, igitur non poterit quisquam suam personam vendere qui enim vendit aliquid est dominus illius rei saltem si sic tradit quod traditionem debet sequi translatio dominii, quia nemo plus iuris in alium transferre potest quam ipse habere noscatur." See Dig. 9.2.13.

[86] Apparently, this argument was introduced and applied to the case of *redditus in persona* by the canon lawyer Niccolo de Tudeschis (Panormitanus) in his *disputationes* (*disputatio V*). Summenhart reviews this particular idea in Question 79. According to Summenhart's report, Panormitanus maintained that a contract in which someone constitutes *redditus* in one's person and assigns this right to another person for money is not a contract of sale. This is because "if the one who constitutes a *redditus* over oneself was said to sell it, then one would sell either one's person or the right over one's person (*ius in personam suam*), and neither of these could one be said to do, because no one is *dominus* of one's members." *Opus septipartitum*, q. 79, sig. D5r: "…quia si ipse constituens super se redditum diceretur eum vendere, aut venderet personam suam, aut ius in personam suam, et neutrum potest dici, quia nemo est dominus membrorum suorum…" Panormitanus admits, however, that the former seller can oblige himself by *stipulatio* to giving a certain amount of money every year. "…quod

In his reply, Summenhart agrees with the counter-argument to a certain extent. He admits that no one is *dominus* of his members in the sense that he could destroy them or cut them off without legitimate cause simply of one's own will.[87] However, according to Summenhart, this qualification does not annul man's self-mastery; it merely rules out absolute or arbitrary self-mastery. As he points out:

> this is not to say, however, that one could not oblige oneself and one's members to certain good deeds or to some useful and legitimate use for another; for a legitimate cause, one may even cut off one's members as is the case when, without amputation of a limb, the whole body would die.[88]

Summenhart is here claiming that there is actually no limit to what man can justly do to himself. In this sense it is inaccurate to claim that man is not the *dominus* of his own members. In order to engage in extreme obligations and actions, a person needs to have a legitimate cause, but that does not change the basic position. Although he is not the absolute *dominus* of himself, neither is he under someone else's dominion.[89]

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predictus venditor potest obligare se ad dandum quolibet anno certan quantitatem, et hoc per stipulationem…" Ibid.

[87] *Opus septipartitum*, q. 74, sig. B4r: "Sed aliter dicendum quod nemo est dominus membrorum suorum ad abscindendum ea et amputandum aut destruendum sine causa legitima…"

[88] *Opus septipartitum*, q. 74, sig. B4r: "…non autem sic quod non possit se et membra sua obligare ad aliquas honestas operas, aut ad usum utilem et legitimum alicui impendendum, immo ex causa legitima etiam potest ea abscindere, ut patet in casu quo nisi membrum abscinderetur, totum corpus periret."

[89] Liberty is not an absolute right, but neither is ownership. The point becomes clear in a relevant way in Question 57 where Summenhart comments on the known civil law maxim "everyone is the moderator and arbitrator in his own things." *Opus septipartitum*, q. 57, sig. FF2v: "Tertio arguitur, unusquisque in re sua est moderator et arbiter ut dicit ius civile…" He remarks that 'it is licit for every *dominus* to master and use his own things. This is true if they are mastered properly and used according to the right reason. For it is of interest to the commonwealth how one uses his things. Otherwise it would be licit for *dominus* to use his female slaves in any way whatsoever and thus abuse them.' *Opus septipartitum*, q. 57, sig. FF2v: "Unicuique domino licitum est rei sue dominari et ea uti. Nam verum est si debite ei dominetur et secundum rectam rationem ea utatur. Nam interest reipublice qualiter quiusque rebus suis utatur. Aliquin liceret domino uti ancillis suis qualitercunque, et sic abuti." Now we can see how the ownership of slaves is parallel to the liberty of oneself. Both are formally defined rights in the sense that they are rights with no defined content, and only the borderlines are marked. The significant feature here is that the ownership of slaves is not an absolute right; the right-holder's actions are restricted by the demands of *recta ratio* and the interests of the common weal or commonwealth.

Summenhart argues further that civil law in fact supports the idea of a free person as the self-master. He remarks that "if man did not have the right over himself or over his body in the way meant above, then there would have been no point in including in the *Institutes* the title *De his qui sunt sui iuris*, the kind of people that free men are."[90] The fact that the chapter about free and independent men (i.e., men who are under no one's *dominium*) is included in the *Institutes* implies that civil law recognizes man's self-mastery as a relevant principle in civil jurisprudence and society.

Summenhart supports his legal argumentation with an appeal to theological authority. He remarks that in discussing marriage in the fourth book of his sentence commentary, John Duns Scotus opposed the view of a doctor who had claimed that the mutual exchange of bodies that takes place in the matrimonial contract requires God's explicit approval. The reason is that the bodies of the bride and groom are actually God's bodies; the contracting parties cannot transfer them without the approval of their *dominus*. Summenhart reports that Scotus negated this line of thought by stressing that "even though man through creation is dependent on God for everything he can, God does not demand so much from man; God even leaves man to his liberty, except that he must follow the Ten Commandments."[91] This quotation from Scotus makes explicit the very idea that Summenhart is promoting: the idea of God-given liberty restricted by the law. Summenhart introduces another passage from Scotus that directly concerns the question at hand. He notes that according to Scotus, "someone can sell himself into slavery even though there would not be any specific divine approval to do that."[92]

In the middle of his discussion, Summenhart draws attention to an alternative solution that he attributes to "a certain lawyer" (*quidam*

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[90] *Opus septipartitum*, q. 74, sig. B4r: "Unde si homo non haberit ius super se vel suum corpus modo dicto, tunc inanis esset titulus in institutis de his qui sunt sui iuris, cuiusmodi sunt liberi." See Instit. 1.8.

[91] *Opus septipartitum*, q. 74, sig. B4 r: "…et Scotus in IIII dis. xxvi, q. i, invalidando quandam rationem cuiusdam doctoris qua volebet probare quod mutuam translationem corporum que fit in contractu matrimoniali, congruum fuit a deo approbari, eo quod corpora illa sunt dei, et sic non deberent contrahentes ea sic transferre sine approbatione domini dicit, quod licet homo ex creatione teneatur deo in omnibus que potest, tamen deus non tantum exigit ab homine, immo dimittit eum libertati sue solummodo ut servet precepta decalogi."

[92] *Opus septipartitum*, q. 74, sig. B4r: "Et idem dicit dis. xv, q. i, quod aliquis potest se in servum vendere, licet de hoc non inveniatur specialis approbatio divina, hec ille."

iurista). Summenhart does not accept this solution. It appears that the reason for introducing the view of this *quidam iurista* is to provide a clarifying contrast to his own position. Summenhart says that according to this lawyer, the sale of a free man "is sustained by virtue of the law, which law is the master of human members." Summenhart explains that the point in this view is that a person could sell oneself only if the law authorizes one to this action. "Similarly as one could not oblige oneself in prison with a pact because one is not the *dominus* of one's members, one can be thus obliged by the statutes." The reason for this would be that "the statutes are made by the commonwealth, which is the *dominus* of the human members."[93]

Summenhart refutes this solution by qualifying the original argument. The lawyer's argument was focused on what a person can or cannot do, while Summenhart emphasizes on what a person may do licitly or illicitly. Accordingly, he argues that this lawyer is guilty of a false supposition, "namely that it would not be licit for a person to sell himself without the authority of the law approving this sale." He argues that it would be licit for the person to sell himself before the enactment of the civil or imperial law.[94]

> For if it were illicit before the authorization made by imperial law, this would mean that before that, it was prohibited by some other law, for example divine, natural, or canon [law]. And if this is so, then it could not be made licit by the arrival of imperial law, for imperial law cannot turn licit what is illicit by divine, natural, or canon law.[95]

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[93] *Opus septipartitum*, q. 74, sig. B4r: "Ad tertium dicit quidam iurista quod talis venditio sustinetur virtute legis, que lex est domina membrorum humanorum, et sic vult dicere, quod talis non posset se vendere, nisi accedente auctoritate legis autorizantis, sicut in simili aliquis non potest per pactum se obligare ad carcerem, quia non est dominus membrorum suorum, potest tamen obligari ex forma statuti, quia edictum a republica que est dominia membrorum humanorum."

[94] *Opus septipartitum*, q. 74, sig. B4r: "Unde non valet prima solutio quia supponit falsum scilicet quod nisi auctoritas legis accessisset approbantis illam venditionem, non liceret alicui seipsum vendere per se vel per alium immo ante legem imperialem aut civilem licuisset." Apparently, Summenhart deduced this supposition from the claim that the commonwealth or the civil body politic is the dominus of its human members, for it is illicit to sell a thing without the approval of the owner.

[95] *Opus septipartitum*, q. 74, sig. B4r: "Nam si illud ante legem imperialem auctorizantem non licuisset, ergo ante eam alique alia lege prohibitum extitisset, puta divina, naturali vel canonica, et si sic, ergo per legem imperialem supervenientem non potuisset fuisse factum licitum. Nam lex imperialis non potest licitum reddere quod lege divina, naturali vel canonica est illicitum."

Here, Summenhart's point is two-fold. First, he reminds that there is a relevant constraint on the authority of civil law. The illicit cannot be made licit by the command of a human legislator. Second, he underlines the principle difference between his own approach and the lawyer's. For the lawyer, an action is illicit as long as the (civil) law has not authorized it. For Summenhart, an action is illicit only if the (civil, divine, natural, or canon) law prohibits it. In his liberty-based approach, every action is *prima facie* licit.

Summenhart's defense of the free man's self-mastery culminates in his discussion of the fourth counter-argument. The argument considers Summenhart's position to be untenable because in principle, "it is prohibited by civil law to sell and stipulate a free man." A law from *Digesta* verifies the point: "we cannot knowingly buy a free man." (Dig. 18.1.34) A free man cannot be turned into commerce. Two other sections from *Digesta* (Dig. 45.1.83 and 45.1.118) are also noted for further demonstrating that imperial civil law prohibits the free man from selling himself. In that way, the argument is claiming that imperial law denies the free man the particular right that appears as constitutive for individual self-mastery in the juridical framework of discussion.[96]

Summenhart begins his response by making a distinction that he had already implied in the preceding counter-argument. He points out that the sentence "a free man cannot be sold" can be understood in two ways. First, it can be taken to mean that it is not licit for someone to sell a free man and that one even sins in so doing. Second, it can be taken to mean that, if a free person is sold, then the sale will not hold nor can it give rise to civil actions.[97] On the basis of this distinction, Summenhart suggests that it is the first understanding that concerns theologians, whereas the latter pertains to lawyers.[98] Having thus specified the scope of his inquiry as a theologian, he concentrates

[96] This conclusion is verified with reference to two other laws: Dig. 45.1.83 and 45.1.118. *Opus septipartitum*, q. 74, sig. B3v: "Quarto, quia lege civili prohibetur liber homo vendi et stipulari, quia liber homo non est in commercio nostro. Unde in lege, si in emptione, § liberum, Digesta, de contrahenda emptione, dicitur, liberum hominem scientes emere non possumus, ergo non potest in commercium adduci, l. liber homo, l. inter stipulantem, § sacram, de verborum obli. § i."

[97] *Opus septipartitum*, q. 74, sig. B4r: "Primum est liberum hominem non posse vendi, potest dupliciter intelligi. Primo sic, id est non licet alicui eum vendere, immo peccat vendendo eum. Secundo sic, id est si quis eum vendad, non tenet venditio, sic quod sicut vendenti non datur actio sic emptori non datur actio exempto."

[98] *Opus septipartitum*, q. 74, sig. B4r: "Si primo modo intelligatur (qui intellectus spectat ad theologum plus quam secundus, quia est de materia peccati)…"

on investigating whether, in light of what was stated in the counter-argument, it is not licit to "knowingly buy a free man."

Summenhart assumes first, as in the argument, that the seller is aware that the person in question is free, and second, that the free person in question wants to be sold. This leads him to conclude that the one who sells a free person does not sin.[99] For if he did sin, he would either do an injustice to the person to be sold or act against a prohibition of civil law.[100] In Summenhart's view, the case meets neither of these conditions. The one who sells does not perform an act of injustice against the person to be sold because "willingly there is no injury," as Summenhart quotes the maxim of the Roman law that was a well-known principle in ancient thought.[101] Nor does he act against the prohibition of civil law. By way of clarification, Summenhart remarks that:

> It is to be noted that laws regulate many things that this or that cannot take place, which, however, concerns only the invalidity of doing it, but they do not on this account prohibit one from doing it; yes indeed, more often it is the other way round: several things are prohibited in human law, which, however, will hold as valid, although they should not be done.[102]

The point is that, according to Summenhart, civil laws that are claimed to prohibit the sale of a free person seem only "to dictate the invalidity of the contract," but they do not prohibit one from selling.[103] In his

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[99] *Opus septipartitum*, q. 74, sig. B4v: "Si autem scit eum esse liberum, tunc si simpliciter volentem vendit iterum non peccat…"

[100] Summenhart's discussion makes use of the division of laws into the divine, natural, and human laws. As we saw above, it is his view that the will of God does not prohibit man from selling himself; what remains an open question is whether this action is prohibited by the law of natural reason or by human law.

[101] Dig. 47.10.1.5. According to this legal principle, a person who has voluntarily entered into a contract (and thereby obligated himself) has no grounds to complain by appealing to the injury suffered (*iniuria*). This maxim emphasized the *prima facie* justification of voluntary contractual transactions between men of full age and capacity. One variant of the principle is found in Aristotle's *Nicomachean Ethics*. In book 5, Aristotle maintained that injustice or unjust action by definition presupposes that one who acts, acts voluntarily, and the one who is acted upon, is acted upon against his will. Thereby, no one can suffer injustice voluntarily. Aristotle, *Ethica Nichomachea* V, 8–9 (1135a15–1136b10).

[102] *Opus septipartitum*, q. 74, sig. B5r: "Unde notandum quod multa disponuntur in legibus in quibus dicitur hoc vel hoc non posse fieri, que tamen non disponunt nisi super invaliditate illius facti sed non propter hoc prohibent illud factum, immo quod plus est econtra nonnulla prohibentur in iure humano que tamen facta tenent licet fieri non debuerint."

[103] *Opus septipartitum*, q. 74, sig. B4v: "…probatur igitur hoc primo sic, quia si peccaret, maxime contra venditum, sed hoc non, quia volenti non fit iniuria, secundo quia

view, no reasons are given to think differently when the seller and the person to be sold are one and the same.[104]

Summenhart's reasoning shows that he consistently builds his account on the idea that man's self-mastery, his natural liberty, is limited only by prohibitions. Because the law does not prohibit man from selling himself, man can plausibly be called *dominus* of his own person. The legal fact that the sale of a free person is invalid according to the law means that, were the free man sell himself into slavery, he would not actually become a slave. This, however, is a secondary fact that does not have a direct effect on man's self-mastery.[105]

2.3. *Right as a relation*

Along with the ideas about right as power and right as dominion, the third constituent of Summenhart's concept of an individual right is that right is a relation. Summenhart introduces this viewpoint at the beginning of his discussion of *ius*. Having introduced the elementary distinction between *ius* as law and *ius* as power, he notes that these two "rights" differ. In the first sense (i.e. right as law) right is an absolute thing,[106] whereas:

> In the second sense [i.e. right as power] right is a relation, namely, a habitude founded in the one who is said to have the right and terminated

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si sic, maxime quia esset prohibitum iure positivo, sed hoc non, quia talia iura que hoc videntur prohibere, solum videntur disponere super invaliditate contractus, non autem super prohibitione contractus unde disponunt quod ex illo contractu non oriatur obligatio civilis que pariat actionem, unde emptor non est obligatus venditori civiliter nec etiam venditor empori saltem scienti, sed non prohibent venditori venditionem."

[104] *Opus septipartitum*, q. 74, sig. B4v: "Et ex hoc etiam potest inferri quod ius admittat sic quod non prohibeat quod quis seipsum vendat, patet illa illatio, quia non videtur ratio diversitatis, quamvis aliqui iuriste dicant primum posse fieri non tamen secundum…"

[105] The case of *redditus in persona* remained the unique instance in *Opus septipartitum* in which Summenhart appealed to the principle of *libertas* in moral reasoning. Nevertheless, this was significant enough to create a fresh approach to theological ethics in the late medieval moral milieu. In particular, Summenhart's reasoning suggested that when we are evaluating morally controversial questions, we may start our inquiry from the position that man has the right to act as he pleases, so long as he does not act against the dictates of right reason. This was a liberty-based approach to morality and one that also recognized the limits of man's liberty and took them seriously. For Summenhart's view, see also Varkemaa 2005 and 2006.

[106] *Opus septipartitum*, q. 1, sig. A6r: "Sed primo modo capiendo est oratio mentalis, scripta vel vocalis, quia omnis lex est oratio mentalis scripta vel vocalis…sequitur quod ius primo modo est res absoluta."

> to the thing, over which or in which one has the right as to the remote terminus and to the action one can exercise toward the thing or with regard to it as to the proximate terminus.[107]

This description could be read as another definition of right, one that views right from an alternative perspective as compared to the *genus-species* distinction in Gerson's descriptions. Summenhart describes right as a habitude, meaning that right is a relational disposition inhering in the right-holder. Furthermore, he notes that this habitude is founded in the right-holder. This expression denotes that right has a foundation and that this foundation can be predicated of the right-holder. Thus, according to Summenhart's terminology, right is a relation that is founded both on its foundation and in its subject, that is, the right-holder. Further, according to Summenhart, right as a relation has two termini: The proximate terminus is the action, and the remote terminus is the thing over which or with regard to which the action is exercised.[108]

2.3.1. *Potency as a relation*

An approach in which right is classified as a relation was not unknown in the medieval discourse on rights. In Part I, we encountered examples of language that equated *ius* with *dominium*, and *dominium* was taken as an example of an entity that belongs to the category of relations. Further, in the same relational framework, right could also be described as power.[109] However, Summenhart's interpretation of right as a relation is special and differs from these previous classifications. As we have seen, his understanding of the term power is indebted to the language of natural philosophy with the consequence that he interprets "power" in the physical sense as active potency. But in what sense exactly can potency be classified as a relation? Summenhart gives an explicit answer to this question:

> Note, however, that as is wont to be said concerning the book of *De anima*: Potency or power of the soul is understood in two ways. Firstly,

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[107] *Opus septipartitum*, q. 1, sig. A6r: "…ius secundo modo est relatio scilicet habitudo fundata in illo qui dicitur habere ius, et terminata in rem in quam vel in que habet ius tanquam ad terminum remotum, et ad actionem quam habet exercere in talem rem vel circa eam tamquam ad terminum propinquum."

[108] For medieval theories of relations, see e.g., Schönberger 1994 and Henninger 1989.

[109] For example, see Olivi's discussion above in chapter 1.3.

> materially or fundamentally, as the reality of the soul, which is apt to elicit acts, and in this way potency of the soul is an absolute thing and not relational, because a relation is not an elicitive entity. Secondly, formally and *pro per se significato*, and in this sense it is a habitude of the soul founded in such a reality, which habitude the soul has toward the object and to acts that it is able to produce in regard to the object. In this sense potency is a relation.[110]

This is an interesting passage on many levels. The basic point here is Summenhart's suggestion that, if we are to understand in exactly what sense a right can be comprehended as a relation, then we must consult the discourse on *De anima*. This is another indication of the influence of the language of natural philosophy on Summenhart's language of rights.

In the quotation above, Summenhart begins his explanation with the expression 'as is wont to be said,' which indicates that what he is going to say was a commonplace in medieval discussions of *De anima*. The situation was not exactly as he says. In late medieval philosophy, questions concerning the relationship between the soul and its potencies formed a controversial topic that divided authors and made visible the differences between the current schools of thought. As far as Summenhart's theory of right is concerned, this passage marks an occasion on which his own preferences for Scotist thinking become relevant.[111]

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[110] *Opus septipartitum*, q. 1, sig. A6v: "Nota tamen quod sicut circa librum de anima dici solet. Potentia seu potestas animae capitur dupliciter. Uno modo materialiter seu fundamentaliter pro realitate anime elicitiva actuum quomodo potentia anime est res absoluta, et non relatio quoniam relatio non est entitas elicitiva. Alio modo formaliter et pro per se significato, et sic est habitudo anime fundata in tali realitate quam habitudinem habet anima ad obiectum et actus producibiles a se circa obiectum, et sic potentia est relatio."

[111] Brett has examined Summenhart's rhetoric here and suggests that the opening words "as is wont to be said" are meant to obscure the controversiality of the issue at hand. According to her, his rhetoric "would not have impressed a knowledgeable contemporary, for the thesis to which he refers was in fact the subject of intense debate in the literature on the *De anima*." She also finds that Summenhart's view comes close to John of Jandun's formulations of potency as a relation. See Brett 1997, 38–40. My view is that Summenhart's terminology does not depend on Jandun's, but connects him to the school of Scotism. As I try to show, Summenhart's basic point here was not, in fact, controversial. Seelmann finds Summenhart's language unclear and concludes that Summenhart was apparently not familiar with Aristotle's *De anima*. This is a misinterpretation. Yet Seelmann is on the right track in suggesting that Summenhart's terminology was influenced by Duns Scotus's writing. Seelmann 1979, 96–97.

Summenhart draws attention to the fact that potency of the soul can be understood in two senses: materially and formally. The details in terminology link Summenhart's distinction to the Scotist school of thought. Yet the point that he underlines with this distinction does not carry any notable Scotistic emphasis. Basically, Summenhart is saying that we can make a distinction between two kinds of signification: what "potency of the soul" names (or signifies *pro denominato*) and what it signifies in itself (or *pro per se*).[112] It was the first mode of signification that gave rise to the medieval debate on the potencies of the soul. Summenhart also takes a stand on this issue by suggesting that the "potency of the soul" names a reality of the soul by which the soul is *principium per se* and which as such is an absolute thing and not a relation. This formulation is in line with the basic Scotist position, and would not have been generally accepted by the rival schools represented by the nominalists, Albertists, or Thomists.[113]

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[112] This distinction corresponds to that between signification *pro denominato* and *pro per se*, which Summenhart had applied to the potencies of the soul in his work on natural philosophy, *Commentaria in summam physicae Albert Magni* (also known as *Philosophia naturalis*), Tract. 5, cap. 1, V3r. In this work, Summenhart makes clear his inclination to Scotist thinking. The distinction was also used by Pierre Tartaret, who was one of the leading Scotists at the University of Paris at the turn of the sixteenth century and who had studied in Paris approximately at the same time with Summenhart. Pierre Tartaret, *Expositio et quaestiones super totam philosophiam naturalem*, De anima, liber 2: "Queritur utrum potentie anime distinguantur per actus et actus per obiecta… Sciendum est primo quod potentia potest capi dupliciter. Uno pro denominato sive fundamento et sic est quid absolutum quod est principium alicuius actionis vel operationis et sic non refertur ad actum cum sit quid absolutum, et sic capitur in textu potentia put apro eo quod denominatur potentia. Alio capitur formaliter seu pro per se significato et sic dicit ordinem ad actum immo non est nisi ille ordo alicuius producentis aliquem actum ad actum talem quem producit, et sic capit philosophus potentiam nono metaphisice, capitulo 7, ubi probat quod actus est prior potentia diffinitione quia potentia diffinitur per actum cum actus terminet relationem que est potentia sub ratione absolut et non sub ratione correlativi, quia tunc etiam potentia diffiniret actum." For more on Tartaret and Summenhart and certain themes of natural philosophy, see Duhem 1959, 97–105, 183–186.

[113] Summenhart's view can be inferred from the quotation with the assistance of what he had written in his *Philosophia naturalis* (in Tract. 5, cap. 1). By saying that the potency of the soul is a reality of the soul, Summenhart implies that the soul and its potencies are distinct, but not really. This excludes Albertists and Thomists who maintained that there is a real distinction between the soul and its potencies. Summenhart openly rejects the idea that the potency of the soul is a relation, because "a relation is not an elicitive entity." This excludes the interpretation that potencies are distinct from the soul only in relation to an action, which was maintained, for example, by Henry of Ghent. The outcome is a position that is in line with the basic Scotist view, which maintains that between the soul and its potencies, there is a formal distinction that is more real than a conceptual distinction, but less real than a real distinction.

The main point Summenhart is trying to make is related to the second mode of signification, namely, what "potency of the soul" signifies in itself. This mode of signification belongs to a neutral area of discussion. The disagreement on what potency of the soul designates does not directly affect the inquiry into what potency of the soul signifies in itself. Summenhart maintains that *pro per se significato* the potency of the soul is a habitude. The foundation of this habitude is the aforesaid reality of the soul, which "potency of the soul" designates. The subject of this habitude is the soul, and the termini of the habitude are the object and the acts that the soul "is able to produce in regard to the object." Thus, in itself potency of the soul signifies a relation of action toward an object.

In the background to this interpretation can be found the approach that medieval theorists attributed to Aristotle. In the second book of *De anima*, at the beginning of chapter four, Aristotle pointed out that if we are to say what a certain potency of the soul is, for example, intellectual potency or sensitive potency, then we have first to define what thinking and sensing are, because acts or actions are prior to potency as far as defining it is concerned. Further, if this is so, Aristotle continued, then we must first investigate the object of sensation and thought. Aristotle's point was thus that the potency of the soul cannot be defined without making reference to the action and the object. This view of potency, which Aristotle also described in the ninth book of *Metaphysics*, justifies the interpretation of the potency of the soul as a relation. Although Summenhart does not explicitly say so, he seems to follow the same idea.[114]

Summenhart uses the above example of 'the potency of the soul' to explain in what sense *ius* is a relation. According to him *ius* and *dominium* should be taken as habitudes in the above sense of potency as a relation. This means, Summenhart emphasizes, that a relation is

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For Scotus's discussion of the matter, see Duns Scotus, *Lib. II Sententiarum*, d. 16, q.1, 760–774.

[114] In medieval discussion, this viewpoint gave rise to another question: whether the potencies of the soul are distinguished by acts and the acts by objects. It was this question that led Tartaret to introduce the distinction between *pro denominato* and *pro per se significato*. In criticizing Henry of Ghent's position, Scotus associated Aristotle's description with the view in which the potency of the soul is seen as the foundation of the relation to which Aristotle referred. Duns Scotus, *Lib. II Sententiarum*, d. 16, q.1, 768: "Contra, quia non quaerimus hic de potentia, prout dicit respectum ad actum: sed quaerimus de fundamento istius respectus, quasi de potentia, quae est, vel potest esse principium operationis…"

predicated of them formally, if not materially.[115] As a scholar representing *via antiqua*, Summenhart felt no aversion to the concept of a relation, but found it useful for clarifying the signification of *ius*. It seems though that Summenhart's principal point is not in connecting the language of rights to metaphysics, but in the suggestion that we should see *ius* as power from the viewpoint in which it appears as a relation.[116]

What does the viewpoint of potency as a relation contribute to the concept of an individual right? The basic idea is that as a relation *ius* cannot be predicated solely of the right-holder. *Ius* relates the subject to the object. In a more specific sense, the interpretation of potency as a relation specifies the idea of a right as power with further precision. By saying that right is a relation, Summenhart is suggesting that the idea of a right as power cannot be understood correctly without making reference to the action and the object. This interpretation emphatically locates the action at the center of rights. The following passage explains Summenhart's views:

> For every right and dominion is a habitude, of the one in which it is, toward the thing or in the thing in regard to which it is had, and this habitude is terminated at this thing solely through a certain act or action, which the one who has the right or dominion is to exercise in that thing or to that thing. For example, the right or dominion that a father has toward his son, is a right towards the son insofar as the father can exercise corrective acts toward the son and directive acts in regard to the same. And the right that one has in his house is a right insofar as he can exercise these acts in the house, namely, to come and go and place his things. Whence everyone has as much right or dominion in regard to a thing as many actions it is licit for him to exercise in regard to the thing.[117]

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[115] Summenhart adds that this habitude is sometimes founded on an absolute thing (as potency of the soul is founded on a reality of the soul) and is always subjected in an absolute thing (as in the soul). *Opus septipartitum*, q. 1, sig. A6v: "…licet illa habitudo fundetur nonnumquam in re absoluta ut patebit, et semper subiectatur in re absoluta differunt autem fundari relationem et eam subiectari."

[116] Nevertheless, Summenhart's description of *ius* as a relation suggests a connection between the language of rights and realist metaphysics in a way that was a red flag for scholars of more nominalist preferences. For example, John Mair (1469–1550) made it clear that the language of rights should not be burdened with metaphysics. He himself followed Summenhart's account of *ius* rather closely, but he did not make any use of the description of *ius* as a relation. See John Mair, *In quartum sententiarum*, dist. 15, q. 10.

[117] *Opus septipartitum*, q. 1, sig. A8r: "Nam omne ius atque dominium, est habitudo illius in quo est ad rem illam in quam vel in qua habetur, et hec habitudo non termi-

In a way, this is almost a physical concept of a right: a right is measured simply by counting the actions in which the potency actualizes itself and which relate the right-holder to the object of the right. Summenhart's designations of the action as the proximate terminus and the object as the remote terminus follows from the logical priority of the action. Although a right is to be had in a thing or over a thing, it is the action that defines the right in the first place.

2.3.2. *Gerson's descriptions from the viewpoint of a relation*

The viewpoint of a right as a relation is built into Summenhart's analysis of Gerson's descriptions right from the start. As was explained above, Summenhart defined that his inquiry is to determine whether Gerson had posited the definitions of *ius* and *dominium* "well and masterfully." The reference to a masterfully posited definition indicates that Summenhart will evaluate the definitions from a viewpoint in which the related criteria are determined by the scientific category into which the defined entity belongs.

Summenhart concludes that the descriptions of right and dominion are masterful. In proving this, Summenhart concentrates on the definition of dominion.[118] He notes first that a description of a relation is

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natur ad illam rem, nisi secundum aliquem actum vel actionem quam habens ius vel dominium habet exercere in illam vel in illa re. Exemplum, ius vel dominium quod habet pater in filium, est ius in filium secundum quod pater potest exercere actum correctionis in filium et actum directionis circa eundem. Et ius quod habet quis in domo sua, est ius secundum quod talis potest exercere illos actus in domo, scilicet ingredi egredi, et res suas inferre. Unde tantum quisque habet iuris vel dominii in aliquam rem, quantum actionis licet sibi exercere circa rem." According to Brian Tierney, Summenhart is saying: "A person had as much right or dominion over a thing as he had freedom of action concerning it." Tierney 1997, 247. In my view, there is no such emphasis on freedom of action in this place. In general, Tierney tends to read the emphasis of liberty into Summenhart's description of *ius* as power. This is misleading and ignores Summenhart's careful and reflective use of the term "power."

[118] As far as the definition of *ius* is concerned, Summenhart proves its masterful nature indirectly through the definition of dominion, which rests on the equivalence of *ius* and *dominium*. *Opus septipartitum*, q. 1, sig. A8r: "Tertia conclusio, utreque descriptiones sunt magistraliter posite, probatur, quia quando diffinitum est relatio, tunc magistraliter describitur si per fundamentum et terminum describitur. Hic autem diffinitum est relatio ut patet supra ex prima suppositione. Et utraque descriptio datur per fundamentum et terminum illius relationis, igitur etc. Minor probatur, quia ille descriptiones habent explicite vel implicite omnes clausulas descriptionis dominii. Modo descrptio dominii datur per fundamentum et terminum dominii, ut probatur in conclusione sexta et dominium est idem cum iure, igitur etiam predicte descriptiones iuris dantur per fundamentum et terminum iuris."

posited well and masterfully, when the description is given by the subject, foundation, and terminus of the relation.[119] With this guidance, he says that the subject of dominion "is implicitly understood when it is said 'appropriate to someone'." This characteristic was in fact present in the description of *ius* and not of *dominium*, but Summenhart bypasses that fact without remark. He continues by saying that the foundation of dominion is implied when it is said "according to rationally instituted laws." According to him, while conceding dominion to someone, these laws identify the foundation of the dominion.[120] In explaining the definition of *ius*, Summenhart further clarifies this relationship between the law and the foundation:

> That clause is set down in order to touch on the foundation of this relation that is called dominion or right, namely, such a relation is founded on something, by reason of which the law wills that such a relation should be appropriate to one… For example, this sentence: "a man who fathers another, giving him his being, has the right and dominion to exercise corrective and directive action at the one who is born," is a natural law according to which the right and dominion over son is appropriate to the father. And this law points out the fact that he has fathered the son as the foundation of the dominion given to the father, and so fathering or fatherhood is the foundation of this dominion.[121]

All in all, the law (or the dictate of right reason) has a two-fold positive function as regards the formation of the right. First, the law defines the foundation of the right, and second, it concedes the right to the subject upon which the foundation is predicated.

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[119] *Opus septipartitum*, q. 1, sig. A8v: "Sexta conclusio, descriptio dominii est bene et magistraliter posita, probatur, quia descriptio relationis bene et magistraliter ponitur quando datur per subiectum fundamentum et terminum. Sed dominium est relatio, et eius descriptio datur per illa, igitur."

[120] *Opus septipartitum*, q. 1, sig. A8v: "Nam subiectum subintelligitur quando dicitur conveniens alicui, fundamentum autem datur intelligi quando dicitur secundum leges rationabiliter institutas. He enim leges ordinaverunt dominium alicui convenire attento aliquo quod in eo nunc est vel processit quod habet rationem fundamenti vel tituli dominii."

[121] *Opus septipartitum*, q. 1, sig. A8r: "Et hec clausula ponitur ad tangendum fundamentum illius relationis que dicitur dominium vel ius. Nam talis relatio fundatur super aliquo, ratione cuius lex voluit quod deberet ei convenire talis relatio.… Exemplum, hec oratio, homo qui alium genuit, dando sibi esse, habeat ius et dominium exercendi in genitum actionem correctionis et directionis, est lex naturalis secundum quam patri convenit ius et dominium in filium. Hec autem lex pro fundamento dominii collati patri, ponit hoc quod est eum genuisse filium, et sic genuisse vel paternitas est fundamentum illius dominii."

Finally, Summenhart locates the two termini for the relation of dominion. According to him, the remote terminus is mentioned in the phrase "other things or as another," for the relation of "dominion is terminated in these." The proximate terminus is "the action that one can exercise with regard to that thing," and this is mentioned in the description in the phrase "of assuming to use etc."[122]

As a further characteristic of the idea of foundation, Summenhart explains that the concept of the foundation of a relation should not be taken in the strict sense "in which it is taken in metaphysics when we say that one in quality is the foundation of similitude." (*Metaphysics* V, text 15 [16], and text 20, Bk. IV, chs. 9 and 15). In this strict sense, "the foundation is said to be a thing that is present in the nature of things with the relation itself." Summenhart maintains that as applied to *ius* as a relation, the concept of foundation is broader than this and "extends to something which is required beforehand of relation or is presupposed to it, although that has already disappeared into past." This description indicates that many kinds of actions or spatiotemporal events qualify as the foundation of *ius* relation. As an example, Summenhart refers to the act of fathering, which "is called the foundation of fatherhood, although fathering has disappeared into the past." In Summenhart's formulation, it is "the act of fathering which founds a father's dominion over the son, in a similar way as the fact of being elected founds the dominion of the prelate over his subjects, and the act of purchasing founds the dominion which is acquired by purchase."[123]

As has already become apparent, Summenhart's explanation of *ius* as a relation lacks any reference to Gerson's text. This conveniently indicates that he reviews Gerson's language from a perspective that is

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[122] *Opus septipartitum*, q. 1, sig. B1r: "Terminus autem remotus relationis tangitur cum dicitur, res alias vel ut alias, quia in illas terminatur dominium. Terminus autem propinquus illius relationis est actio exercitabilis circa illam rem. Et illa actio tangitur cum dicitur assumendi ad usum etc."

[123] *Opus septipartitum*, q. 1, sig. A8v: "Non tamen accipio hic fundamentum relationis stricte, quo modo accipitur in metaphisica cum dicimus unum in qualitate esse fundamentum similitudinis, ibi enim fundamentum dicitur esse res presentialis in rerum natura, cum relatione ipsa. Sed accipio ut etiam se extendat ad aliquid quod preexigitur relationi vel ei presupponitur, licet illud iam transiverit in preteritum, quo modo genuisse dicitur fundamentum paternitatis, licet genuisse transierit in preteritum. Sic genuisse fundat dominium patris in filium, et electum fuisse dominium prelati in subditos, ac emisse dominium quod per emptionem est acquisitum, et sic de aliis suo modo."

alien to Gerson's own approach. As far as the concept of foundation is concerned, however, there is a single instance in which Summenhart refers to Gerson's account, and with critical emphasis. To point out a synonymous vocabulary, Summenhart remarks that the foundation of *ius* is also called the title of *ius* or *dominium* "as when we say that the father has his dominion by the title of fatherhood." This qualification leads Summenhart to criticize Gerson's usage of the term "title." He notes that when Gerson gave his description of *ius*, he called "power or faculty" the title of right (*titulus iuris*). Summenhart finds this inappropriate, because in his view, "faculty is the right itself" and not its foundation.[124] The title or foundation of a right is the reason by which the right falls to the right-holder according to the law. As an example, Summenhart points out that a person possesses a thing or has dominion by the title of prescription or purchase, that is, he has it for the reason that he has purchased it or acquired it by prescription.[125]

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[124] However, contrary to Summenhart's suggestion, in this particular section in *De vita spirituali animae* Gerson appears to use the term "title" as a synonym for "foundation," but he understands the term "title" or "foundation" differently from Summenhart. When Gerson called "power or faculty" the title of a right, he seemed to mean that a right is based on power or faculty in the sense that without power there can be no right. See Gerson, *De vita spirituali animae*, lectio tertia, 26. When speaking of rights that are based on God-given faculties, this was a plausible interpretation. This does not, however, correspond to Summenhart's specific use of the term foundation, which is conditioned by the view of a right as relation. Summenhart also says in his final remark that Gerson in his lections used the term "title" in this sense when Gerson stated that the titles of *dominia* found *dominia*.

[125] *Opus septipartitum*, q. 1, sig. A8v: "Et tale fundamentum vocatur titulus iuris vel dominii, ut cum dicimus, ille titulo paternitatis habet dominium in illum. Iste titulo electionis habet dominium in istos etc. Unde non bene videtur dictum quod Johannes Gerson dicit quod potestas vel facultas que ponitur loco generis in descriptione iuris, vocetur titulus iuris. Nam illa facultas est met ipsum ius, sed potius debet dici quod titulus iuris sit illud, ratione cuius convenit tali secundum legem ipsum ius ut dicimus. Iste possidet hanc rem vel habet dominium huius rei titulo prescriptionis vel emptionis, id est illa ratione habet quia eam prescripsit vel emit. Et sic ipsa emptio vel prescriptio est titulus illius iuris vel dominii. Unde idem met in lectionibus aliquando dicit titulos dominiorum fundare dominia."

CHAPTER THREE

THE SPECIES OF DOMINION

Having developed his view concerning the right of the individual (or the concept of an individual right) in Question 1, Summenhart moves on to clarify what kinds of rights there are. This is the major theme in Questions 2–6 of *Opus septipartitum*. Summenhart's inquiry, the purpose of which is a complete presentation of the species of right, is characterized by two features: the first is the use of *dominium* as the key term in the analysis, a term that Summenhart consistently treats as equivalent to *ius*. The second is that Summenhart builds his account on Jean Gerson's language of rights and discusses three separate ways to classify dominion originating in Gerson's *De potestate ecclesiastica* and *De vita spirituali animae*.[1]

The most distinctive feature in Summenhart's discussion is his consistent effort to systematize Gerson's language. His point is to combine the three classifications of dominion into a coherent whole, which makes a significant contribution to the corpus of the language of individual rights. With justification one could say that here, the process is more important than the outcome. The merits of Summenhart's account reside more in what he does with Gerson's terminology than in what he says about the species of dominion.

Each of Gerson's classifications of dominion manifests the basic view that man's dominion is not uniform, as is God's dominion over creation, but that there are many kinds of dominion man can have. Each represents a different answer to the question: How are we to classify dominion possessed by man? The first classification, taken from *consideratio* 13 of *De potestate ecclesiastica*, is to realize that dominion is not a matter of *de facto* domination or power, but rather dominion is defined by law. Taking the law as the principle of division, Gerson divided dominion into six species: beatific dominion, original

[1] Summenhart's discussion of the species of dominion has not been studied thoroughly. The only exposition I am aware of is Tierney 1997, 250–252.

dominion, the dominion of grace, evangelic dominion, canonical dominion, and civil or political dominion.[2]

The second classification originates in the same chapter of *De potestate ecclesiastica* (*consideratio* 13). Gerson followed the well-known categorization of dominion as a relation and classified man's dominion by using the foundation of the relation as the principle of division. The outcome is that he divides *dominium* into three: dominion, founded on the title of gratifying grace; dominion founded on the title of supernatural grace, which is given gratis but is not gratifying; and dominion founded on the title of a purely natural gift. This classification reflects the distinction between the natural and supernatural gifts of God, as well as the division of the supernatural gift or grace into *gratia gratum faciens* and *gratia gratis data*.[3]

The third classification is taken from Gerson's earlier work, *De vita spirituali animae*, which was written two decades before *De potestate ecclesiastica*. Here, Gerson divided dominion into three parts: divine (or evangelical) dominion, natural dominion, and human (or civil) dominion. This classification followed the division of law into divine, natural, and human law and was thereby another application of the idea that dominion is defined by the law.[4]

In *Opus septipartitum* Questions 2–5 serve as a commentary on Gerson's language. Summenhart reviews the three classifications of dominion and treats each separately, but using the same procedure. First, he gives a detailed explanation of the classification and its rationale. Then follows a critical examination in which Summenhart points out the defects that he has found in that particular classification of *dominium*.

Summenhart's critique has a specific purpose. In Question 6 he introduces his own classification of dominion, which was meant to be complete in the sense that it contained all the species of dominion

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[2] *Opus septipartitum*, q. 2, sig. B1r: "Primus igitur modus dividendi est quod sextuplex est dominium scilicet beatificum, originale, gratificum, evangelicum, canonicum et politicum." See Gerson, *De potestate ecclesiastica*, consideratio 13, 253.

[3] *Opus septipartitum*, q. 4, sig. C3v: "Dominiorum quoddam fundatur in titulo gratie gratificantis, quoddam in titulo alicuius gratie supernaturalis, solum gratis date, non tamen gratificantis. Tertium in titulo alicuius doni pure naturalis…" See Gerson, *De potestate ecclesiastica*, consideratio 13, 253.

[4] *Opus septipartitum*, q. 5, sig. C5r: "Dominiorum quoddam est divinum, quoddam naturale, et quoddam humanum." See Gerson, *De vita spirituali animae*, lectio 3, 27–28.

and furthermore was free of the defects that he objected to in Gerson's writing.[5] Summenhart begins his classification from the principal (*potissimum*) *dominium* possessed by God and ends with human, civil *dominium*, that is, *dominium* defined by civil jurisprudence, which forms the principal framework of reference for Summenhart's discussion in *Opus septipartitum*. Between these two extremes are twenty-one divisions of dominion that Summenhart has drawn on to proceed from God's dominion to the civil dominion possessed by man.[6] It should be noted, however, that Summenhart's own classification in Question 6 relies on his commentary on Gerson in Questions 2–5. Although Summenhart introduces some divisions of dominion that were absent from Gerson's material, the bottom line in his own classification is to show how the species of dominion, which he describes in the commentary on Gerson, are properly structured in the context of his present discussion.[7] Thus, Summenhart's division of dominion into twenty-three branches merely plays the role of the skeleton or the framework for his theory. The flesh and blood or substance is made up of his interpretation of Gerson's classifications.[8]

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[5] *Opus septipartitum*, q. 6, sig. C7r: "Secunda conclusio. Predictus modus dividendi est bonus, quia continet omnes species dominiorum et immunis est a defectibus quibus defecerunt tres precedentes modi dividendi."

[6] *Opus septipartitum*, q. 6. sig. C6r: "Prima igitur divisio est. Dominiorum quodam convenit creatori, quali dominio dei est terra et plenitudo eius, quoddam vero creature.… Decimanona divisio. Dominum humanum est duplex, scilicet canonicum et civile, que sufficienter exemplis sunt declarata in secunda questione. Et quia de solo civili dominio et nobis ad propositum in hoc tractata, ideo illud consequenter subdividendum est."

[7] Summenhart's division shows where civil dominion comes into the picture if dominion is understood a) as equivalent to a right and b) with the aid of Gerson's classifications of dominion. Thus Summenhart's classification conjoins his interpretation of the concept of an individual right with his exposition of Gerson's classifications of dominion and his discussion of juridical property rights.

[8] It should be noted, however, that Summenhart's message is not altogether clear or unambiguous. His account has byways that obscure the rationale of his own classification of dominion. For example, he discusses the dominion possessed by the angels (both blessed and damned) in a lengthy report. See *Opus septipartitum*, q. 4, sig. C6r. Although the angelic dominion had been introduced into the discourse on dominion earlier (by Richard Fitzralph), Summenhart's detailed discussion does not enforce the impression that his main point lies in systematizing the language of rights in a way that contributes to the moral analysis of civil dominion. This has led Brian Tierney to conclude that Summenhart's classification of dominion was an empty structure with no rationale. 'The argument goes on and on and as it moves through the endless distinctions and subdistinctions it seems to become ever more remote from any problems of the real world… This was just the kind of tired late medieval scholasticism that the Renaissance humanists were trying to laugh out of existence.' Tierney 2004,

3.1. *The six-fold dominion*

It is characteristic of Summenhart's commentary that he does not treat Gerson's classifications of dominion as a completely alternative means of classification, but rather he makes an effort to reconcile the classifications with one another. In this respect, the six-fold classification of dominion (*beatificum, originale, gratificum, evangelicum, canonicum*, and *politicum*) is a special task. This is because the six-fold dominion summarizes Gerson's discussion carried out two decades earlier on the pages of *De vita spirituali animae*, in a chapter that counts as his major theoretical discussion of dominion.[9]

There, Gerson maintained that man's existence can be described in terms of four different ontological states or natures, in each of the dominion that was characteristic or unique to that ontological state can be found. When man was still in his primal, instituted nature he had original *dominium*. Civil *dominium* is characteristic of the destitute nature of man. When man's nature was restituted through the evangel of Christ, this restitution brought with it evangelical *dominium*. The fourth nature of man is glorified nature, which provides beatific man with beatific *dominium*.[10]

In *De potestate ecclesiastica* Gerson revised his classification by changing the principle of division. By taking the law as the principle, Gerson was able to make two additional divisions: He separated canonical dominion from civil dominion, and the dominion of grace from evangelical dominion. The account in *De vita spirituali animae*, implied these distinctions, but Gerson could not make them explicit as long as he used the state of man's nature as the principle of division. By using law as the principle, however, these distinctions could be clearly articulated. Civil dominion was "dominion according to civil law," and canonical dominion, "dominion according to canon law." Likewise, the dominion of grace was "dominion according to the law of gratifying grace," and evangelical dominion was "dominion according to the pure law of the evangel." Beatific dominion ("according to the law of glory") and original dominion ("according to the law of original justice") could also be identified on the basis of the law that defines

25. See also Tierney 1997, 250–252. For angelic dominion in Fitzralph, see Fitzralph, *De pauperie Salvatoris*, lib. I, cap VI, 287.

[9] See chapter 1.7. above.

[10] Gerson, *De vita spirituali animae*, lectio 3, 28.

them. Thus, Gerson posited six species of dominion: *beatificum, originale, gratificum, evangelicum, canonicum*, and *politicum*. In order to make clear the connection between this six-fold nature of dominion and his earlier discussion, Gerson repeated his earlier descriptions for original, evangelical, and civil dominion, which he had developed in *De vita spirituali animae*.[11]

In his commentary on the six-fold dominion, Summenhart explains this classification in light of Gerson's theory introduced in *De vita spirituali animae*. Summenhart's discussion is clearly motivated by Gerson's recognition of the connection between his two approaches and division principles. It can also be read as a conscious contribution to developing further the ideas in *De potestate ecclesiastica*. Gerson had not given any detailed explanation of the six-fold qualities of dominion; rather his discussion was limited to introducing the short descriptions given above. By repeating his earlier descriptions from *De vita spirituali animae*, Gerson pointed out where to look for a fuller account, but he himself made no further effort to reconcile the two divisions of dominion with each other.

3.1.1. *Beatific dominion*

In *De potestate ecclesiastica*, Gerson's discussion of beatific dominion was confined to the description: "dominion according to the law of glory."[12] The text of *De vita spirituali animae* provided a longer account, although beatific dominion was not a central theme. By beatific dominion was understood dominion that was characteristic of man in a state of glorified nature.[13] But what is the content of beatific dominion? How does it furnish the blessed persons who have left this life for the glorified state of being? In his commentary, Summenhart follows Gerson's narrative and clarifies the nature of beatific dominion with examples. He maintains that a blessed human has a right such that his glorified body can penetrate any non-glorified body without resistance or can be in the same location as a non-glorified body. Both actions can take place despite the physical realities, for, Summenhart remarks, it is natural for a body to resist another body from penetrating

[11] Gerson, *De potestate ecclesiastica*, consideratio 13, 253.
[12] Gerson, *De potestate ecclesiastica*, consideratio 13, 253: "Beatificum, est Dominium secundum Leges gloriae."
[13] Gerson, *De vita spirituali animae*, lectio 3, 30.

itself just as it is natural for a body not to admit another body in the same place. Summenhart concludes that this right or dominion over the non-glorified bodies can be called the gift of subtlety.[14]

With this example of beatific dominion, Summenhart links to medieval discussions of bodily existence after the resurrection. In that context of discussion, the gift of subtlety was one of the four transcendent endowments (impassibility, brightness, agility, and subtlety) that a glorified saint was thought to receive from Christ.[15] In *De vita spirituale animae*, Gerson had also explained beatific dominion by referring to these endowments. Summenhart's reference is more explicit though, and he takes the opportunity to emphasize that the gift of subtlety should not be understood as a property of the glorified body. Instead, he points out that the gift of subtlety is a right, namely, "the right of being together with another non-glorified body and of penetrating it."[16]

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[14] *Opus septipartitum*, q. 2, sig. B1r: "Beatus habet tale ius quod suum corpus gloriosum potest penetrare quodcunque aliud corpus non gloriosum sine resistentia illius alterius, quamvis naturale sit cuilibet corpori resistere alteri volenti se penetrare. Similiter habet ius quod suo corpore glorioso potest esse in eodem loco cum quocumque non glorioso, non obstante quod naturale est cuilibet corpori non admittere aliud corpus ad locum suum. Unde illud ius vel dominium beatorum super corpora non gloriosa vocari potest dos subtilitatis eorum." As another similar example, Summenhart mentions the right of exercising internal corporal visions in men. He says that in addition to these general examples that are appropriate to all the blessed, it is probable (*verisimile*) that there are some special beatific dominions that fall *singulariter* to some of the blessed and that are founded on a certain special beatitude. As an example, Summenhart mentions that a certain saint has dominion over removing sicknesses from the body, while another saint has dominion over preventing the assaults of demons. Ibid.

[15] See Bynum 1995, 34–38.

[16] *Opus septipartitum*, q. 2, sig. B1r: "Nam dos subtilitatis non est aliqua qualitas in corpore glorioso ratione cuius sibi conveniat esse in eodem loco cum alio, et alia corpora penetrare. Sed est ius essendi cum alio corpore non glorioso et ipsum penetrandi." Like Summenhart, the scholastics generally acknowledged that the glorified body can be in the same place with the non-glorified body. The question debated was: what makes this possible? Some writers referred to the four properties or transcendent endowments (impassibility, brightness, agility, and subtlety) that the saint received from Christ. According to them, the saint had the power to penetrate, by the gift of subtlety, any non-glorified body and take its place. Many writers, however, denied that these actions of the saints could be explained by referring to any property or quality of the glorified body. This was because bodily existence was thought to be defined by spatial dimensions. This principal fact denoted that two bodies could not occupy the same space and yet remain two distinct bodies. Often this problem was solved by suggesting that the glorified body can be in the same place together with a non-glorified body by a special divine power. See e.g., Rainardus Romanus's supplement to the third part of Aquinas's *Summa, Supplementum Tertiæ Partis*, q. 83, a.2, co. Summenhart follows this line of thought by maintaining that the gift of subtlety is a right.

Gerson's six-fold classification of dominion was based on the idea that dominion is defined by law. Yet he did not explicate the law or its content in any detail with respect to the individual species of dominion. With respect to civil and canon law, such an explanatory account would certainly have been unnecessary or even trivial. But what is understood of the law of grace and how does it differ from evangelical law? Or what kind of law is the law of glory? Faced with these questions, Summenhart adopts a two-fold strategy. On the one hand, it is characteristic of his approach that he does not describe the content of these specific laws. On the other hand, he nevertheless defends the existence of these individual laws and the differentiation of dominion based on them.

Summenhart confronts the issue with respect to beatific dominion. He acknowledges that to speak of the law in the context of the glorified state of man might seem inappropriate to some. One could argue, he states, that there are no laws in the glorified state, as is written in Tim. 1: "the just are under no law." If this is true, then the conclusion should be that the description errs in stating that beatific dominion is defined by the law of glory.[17] The rationale of this argument lies in the view of law as a restrictive norm imposed on human agency. The point is that the saints—because they are without sin—do not need any restrictive guidance. Summenhart refutes this argument with a reply that rests on a broader view of the law. He admits that in the state of the blessed, "there is no prohibitive law, nor commanding law, as the argument proves." His point nevertheless is that "there may well be concessive laws by which the blessed are conceded various rights and dominions to furnish their beatitude."[18] Here, Summenhart makes use of the division of law into the prohibitive, preceptive, and concessive or permissive sanctions, which was recognized in medieval legal discourse. He interprets the "concessive law" as a law that not only

[17] *Opus septipartitum*, q. 2, sig. B1r: "Et si arguatur, in statu beatorum, nulle sunt leges, igitur male dicitur in descriptione secundum leges glorie. Andecedens probatur, quia I ad Timotheum I, dicitur. Iusto non est lex posita, ergo multo magis non est ponenda lex aliqua illis qui confimati sunt. Et confirmatur quia beati sunt impeccabiles. Modo lex non ponitur nisi peccabili nature, igitur."

[18] *Opus septipartitum*, q. 2, sig. B1r: "Dicendum quod in eorum statu non est lex prohibitoria nec etiam preceptoria ut probat argumentum, sed bene leges concessorie quibus conceduntur beatis varia iura, ac dominia pretextu sue beatitudinis."

permits but also in a positive way authorizes and enables a certain action by conceding a right to this action.[19]

The remark on the concessive law illustrates in general how Summenhart understands the way in which dominion is defined by the law. While this was Gerson's basic idea, he did not reflect on this mode of definition in any detail. Summenhart's commentary provides an explanation. Beatific dominion, he writes, "is dominion which is appropriate to the blessed according to the law of glory."[20] Here we have the idea that the law of glory establishes or concedes beatific dominion to the blessed. The blessed are thereby identified as subjects of beatific dominion. Summenhart further specifies that "this dominion is founded on beatitude, so that beatitude is the title of that dominion."[21] On the whole, this interpretation is in line with the way in which Summenhart understands the notion of a relation as defined by the law in general: The law defines the foundation of the relation and concedes the relation to the subject upon which the foundation is predicated.[22]

Summenhart stresses the role of the foundation in differentiating the species of dominion from each other. Together with the glory law, it is beatitude that identifies the beatific dominion, "because no other has beatitude as its foundation."[23] Summenhart remarks that by its foundation, beatific dominion is differentiated, not only from the dominions that man may possess in this life, but also from the natural dominion of the blessed. The fundamental idea is that "accidentally, it is possible to find diverse kinds of dominion simultaneously in one subject, but the dominions have different foundations by reason of which they fall to their subject." As an example of the natural dominion of the blessed, Summenhart mentions the dominion that

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[19] This classification corresponded to the deontic classification between the forbidden, the obligatory, and the permitted. For medieval deontic logic, see Knuuttila 1993, 182–196.

[20] *Opus septipartitum*, q. 2, sig. B1r: "Beatificum describitur sic. Est dominium conveniens beato secundum leges glorie."

[21] *Opus septipartitum*, q. 2, sig. B1r: "Et illud dominium fundatur in beatitudine, ita quod beatitudo est titulus illius dominii."

[22] See chapter 2.3. above.

[23] *Opus septipartitum*, q. 2, sig. B1r: "Secundo dicitur conveniens beato ratione sue beatitudinis. Et in hoc idem dicitur quod in predicta descriptione cum dicitur, conveniens secundum leges glorie, quia leges glorie concedunt dominia beatifica beatis ratione beatitudinis. Et in hac clausula distinguitur dominium beatificum ab omnibus aliis, quia nullum aliud habet pro fundamento beatitudinem."

the will (or the soul) has with respect to the inferior potencies, such as the potency of motion. He emphasizes that such a dominion is not appropriate to the blessed by reason of their beatitude; it would still exist if the beatitude were taken away, like it existed before the beatitude appeared. Thus, as natural dominion, the dominion of the will is something that characterizes human existence in general. To point out the foundation of the dominion of the will, Summenhart says that the dominion of the soul is appropriate to blessed persons by reason of a natural gift, namely, by reason of the freedom of their will.[24]

3.1.2. *Original dominion*

Summenhart's discussion culminates in a detailed definition that conjoins the two division principles of dominion, found in *De potestate ecclesiastica* and *De vita spirituali animae*. Summenhart uses a similar definition for beatific dominion, but in his discussion of original dominion, the details of his method of working on Gerson's language can be clearly traced. The starting point for Summenhart's discussion is the two descriptions that Gerson presented in *De potestate ecclesiastica*. The first was the short definition in which original dominion is differentiated within the six-fold classification. Summenhart interprets this definition in the same manner as he interprets the corresponding description of beatific dominion. According to him, original dominion "is dominion according to the law of original justice, which is tacitly understood: it is appropriate to someone; supplement: to the one who is, or was, in the state of original justice."[25]

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[24] Together with the freedom of will, Summenhart mentions here, as theologians often did in speaking of human freedom, the divine concern by which God generally accompanies the actions of secondary causes. *Opus septipartitum*, q. 2, sig. B1v: "Unde tangitur hoc proprium fundamentum, vel titulus dominii beatifici, ratione cuius ipsum distinguitur a dominio naturali beatorum. Nam et beati habent aliqua dominia naturalia, quemadmodum est dominium anime secundum quod est voluntas in potentias inferiores ut in potentiam motivam. Nam tale dominium licet conveniat beatis, non tamen ratione beatitudinis, quia etiam sublata beatitudine adhuc maneret illud dominium sicut etiam aderat antequam adesset beatitudo. Tale dominium convenit beato ratione naturalis doni scilicet libertatis ipsius voluntatis et ratione divine dignationis, qua deus dignatur generali concursu concurrere ad actiones causarum secundarum. Et sic per idem patet quare equivalens clausula ponitur in prima descriptione dominii beatifici scilicet secundum leges glorie. Unde per accidens contingit dominia diversorum generum reperiri simul in uno subiecto sed habebunt diversa fundamenta seu titulos ratione quorum conveniunt illi subiecto."

[25] *Opus septipartitum*, q. 2, sig. B1v: "Est dominium secundum leges iusticie originalis, et subintelligitur, conveniens alicui, supple ei qui est, vel esset in originali iusticia."

The second of Gerson's descriptions had been introduced earlier in *De vita spirituali animae*. By repeating this description in *De potestate ecclesiastica*, Gerson made the connection between the two approaches explicit and thereby furnished Summenhart a general rationale for his later discussion of the six-fold dominion. In this description, original dominion

> …is God's gift, by which the rational creature has a right, directly from God, to take other, inferior things to his use and conservation, is able to belong equally to several, and is inalienable when the original justice is preserved.[26]

Having introduced this description, Summenhart reviews it with a critical eye. He notes Gerson's characterization of original dominion as "God's gift by which the rational creature has a right to take other inferior things to his use and conservation." This formulation seems to suggest that there is a distinction between original dominion and the right to utilize the things of this world, as though the right would be founded on the dominion. Summenhart does not accept this interpretation as valid, but stresses that original dominion is the very "right to take other inferior things to his use and conservation." Further, he takes the phrase "God's gift" to signify the foundation of this relation of dominion, not the dominion itself. Summenhart evaluates Gerson's description from this standpoint. The phrase "God's gift," he states, should not be read as a formal predication, because the foundation of a relation is not truly predicated of the relation in a formal predication. Instead, he suggests that "God's gift" should be understood as a material or fundamental predication. It thereby signifies that dominion is a "relation founded on God's gift." Although Summenhart's criticism remains implicit, it becomes apparent that, for him, Gerson's description does not qualify as an adequate formal description of the original dominion.[27]

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[26] *Opus septipartitum*, q. 2, sig. B1v: "Est donum dei quo creatura rationalis ius habet immediate a deo assumere alias res inferiores in sui usum, et conservationem pluribus competens ex equo et inabdicabile, servata originali iusticia." This description is not exactly identical with the one given by Gerson. See below Summenhart's discussion of the original dominion vs. natural dominion.

[27] *Opus septipartitum*, q. 2, sig. B1v: "Quod autem in secunda descriptione dicitur. Est donum dei intelligendum est non per predicationem formalem quoniam fundamentum relationis non predicatur vere de relatione predicatione formali. Dominium autem est relatio fundata in dono dei saltem in illo ratione cuius convenit ei ius assumendi, et hoc ius est dominium originale fundatum in originali iusticia que est eius

Summenhart's critical remarks lead him to introduce his own definition, which he presents as a corrected version of Gerson's. Accordingly, original dominion:

> …is dominion directly from God, appropriate according to the laws of original justice to the one who is in that state and for that reason, is able to belong equally to several and is inalienable when the very thing, namely, original justice is preserved.[28]

Summenhart has placed the term "dominion" in the place of the genus, "for dominion is the formal genus for the original dominion and other dominions." He points out that, as a consequence of this action, the sentence "by which the rational creature has a right to take other inferior things for his use and conservation" should not be added to the definition. As justification, Summenhart refers to the definition of dominion and points out that all these clauses are included in the genus "dominion."[29]

In addition, Summenhart has included in the definition a characterization that spells out his interpretation of *De potestate ecclesiastica*'s short definition. Thereby, original dominion is "appropriate according to the laws of original justice to the one who is in that state and for that reason." In that way, he literarily joins the two approaches, in *De vita spirituali animae* and *De potestate ecclesiastica*.

The resulting definition is the major embodiment of Summenhart's method of systematizing Gerson's language. He introduces a corresponding definition for beatific, evangelical, and civil dominions as well as for the dominion of grace.[30] In each case, the definition is

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fundamentum ac titulus. Sed debet intelligi predicatione fundamentali et materiali ut sit sensus. Est donum id est relatio fundata in dono dei."

[28] *Opus septipartitum*, q. 2, sig. B2r: "Est dominium conveniens immediate a deo secundum leges originalis iusticie ei qui esset in illa ratione eiusdem, pluribus competens ex equo et inabdicabile, servata eadem scilicet iusticia originali."

[29] *Opus septipartitum*, q. 2, sig. B2r: "Nam dominium est formale genus ad dominium originale et alia dominia, nec oportet tunc addere ad dominium alias clausulas omnes scilicet quo creatura rationalis habet ius assumendi res alias in sui usum, quia ille clausule omnes includerentur in illo termino dominium, posito loco generis, quia ille clausule sund de diffinitione dominii in communi accepti."

[30] Summenhart's definition stated that beatific dominion is *dominium*, directly from God, appropriate to the blessed by reason of one's beatitude, according to the laws of glory or beatitude, able to belong equally to several, inalienable when the beatitude is preserved. *Opus septipartitum*, q. 2, sig. B1r: "Est dominium immediate a deo conveniens beato ratione sue beatitudinis secundum leges glorie vel beatitudinis pluribus competens ex equo ac inabdicabile servata beatitudine." The definitions of the dominion of grace and evangelical and civil dominions will be discussed later.

followed by a detailed explanation during which Summenhart reviews the definition clause by clause and explains how the individual characterizations distinguish a particular dominion from the other species of dominion. In this respect, the characterizations derived from *De potestate ecclesiastica* and *De vita spirituali animae* work differently. The law and the foundation that embody Summenhart's interpretation of *De potestate ecclesiastica*'s approach distinguish the particular dominion from all other species of dominion. Thus, original dominion is differentiated by the fact that it is founded on original justice and conceded to the subject by the laws of original justice.[31]

The approach in *De vita spirituali animae* appears in the characteristics with which Summenhart describes the origin of original dominion ("directly from God"), its non-exclusive nature ("is able to belong equally to several"), and its inalienability ('is inalienable when the original justice is preserved'). In an important way, these characteristics are derived from Richard Fitzralph's account of original dominion, but Gerson used them differently in his discussion.[32] While Fitzralph believed that these attributes characterized the dominion possessed by man in this world in general, Gerson maintained that they characterized some species of dominion, but not all. For this reason, the species of dominion could be compared and differentiated in light of these characteristics. As a result, Gerson differentiated original dominion and (evangelical) dominion based on the grace from civil dominion. It was human, civil dominion then that was conversely identified in light of these characteristics.[33]

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[31] *Opus septipartitum*, q. 2, sig. B2 r: "Dicitur secundo secundum leges originalis iusticie, per quam clausulam distinguitur ab omnibus aliis dominiis, quia alia dominia secundum alias leges conveniunt suis subiectis. Dicitur tertio, ei qui est vel esset in illa, ubi tangitur eius subiectum. Dicitur quarto, ratione eiusdem, in hoc tangitur fundamentum vel titulus illius dominii, in quo etiam distinguitur ab omnibus aliis dominiis, quia alia habent alios titulos, vel fundamenta ratione quorum sunt concessa per leges suis subiectis."

[32] In his *De pauperie Salvatoris*, Fitzalph's basic claim was that there is no dominion except that founded on gratifying grace. He called this as original dominion and stressed that original dominion is given immediately by God, is shared equally by all true believers, and is inalienable in the presence of its foundation. See chapter 1.6. above.

[33] See chapter 1.7. above. In *De vita spirituali animae*, Gerson did not include a description for beatific dominion, which in general t received less attention than original, evangelical, and civil dominions. This seems only natural, for beatific dominion was not directly related to Fitzralph's conclusions concerning dominion based on charity nor to its implications for property and political authority. Summenhart

Summenhart's definition broadens this comparison to cover the six-fold species of dominion, but the general rationale remains the same and shows the unique character of human or civil dominion. In speaking of civil or political dominion as well as canonical dominion, Summenhart says: "these are appropriate—to whom they are appropriate—indirectly from God, namely, as mediated by man, as the foundation of this dominion is conceded to the person by man."[34] Further, civil dominion is an exclusive relation or as Summenhart defines it: "a single object cannot have several *dominos*, in speaking of the same species of civil dominion."[35] Civil dominion is alienable because "the *dominus* can alienate it, for example, by transferring it to another by donation, sale or exchange, etc."[36]

It is characteristic of Summenhart's definition that he does not actually tell anything about the actions, over which the dominion is the power or right. In this sense it differs from Gerson's description of original dominion (in *De vita spirituali animae*). Summenhart introduces an example to clarify the nature of original dominion. He observes: "When the First Parents had original justice, they were given, by reason of this justice, the right of eating of all the trees in Paradise, excluding the tree of knowledge of good and evil, as well as the right to live in that place and exercise other activities there." Summenhart locates the instant of the concession of original dominion in God's

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does not create any such priorities, but discusses each species of dominion to a similar degree.

[34] *Opus septipartitum*, q. 2, sig. B1r: "Primo dicitur immediate a deo, et per hoc distinguitur a dominio canonico et politico, quia talia conveniunt his quibus conveniunt mediate a deo scilicet mediante homine, a quo conceditur aliqui tale dominium, sicut et ab homine conceditur sibi fundamentum talis dominii…"

[35] On this point, Summenhart is referring to the medieval doctrine of double ownership with a distinction between *dominium directum* and *dominium utile*. The point is thus that "several lords can have the same thing under diverse kinds of civil dominion," if one has *directum* and the other *utile*, but not if both dominions are of the same species. *Opus septipartitum*, q. 2, sig. B1v: "Et in hac clausula distinguitur a dominio civili, quia civile non competit ex equo pluribus respectu eiusdem rei, saltem in proprio et speciali. Non enim potest una res habere plures dominos, loquendo de civili dominio eiusdem speciei, quod dico, quia unius rei possunt esse plures domini civiliter diversis dominiis civilibus, scilicet cum unus habet dominium directum, ut habet dominus feudi, et dominus ipsus emphiteote, alter utile ut vasallus, seu feudatarius et similiter emphiteota." For the distinction between *dominium directum* and *dominium utile*, see Feenstra 1971. For *emphyteusis* in Roman law, see e.g., Thomas 1976, 142, and Nicholas 1962, 148–149, 157.

[36] *Opus septipartitum*, q. 2, sig. B1v: "Quarto dicitur inadbdicabile, in hoc distinguitur a dominio civili, quia hoc potest dominus a se abdicare, puta transferendo illud in alium per donationem, venditionem vel permutationem vel huiusmodi."

verbal endowment, documented in the second book of Genesis ("Eat of all the trees of Paradise…").[37] Here, it was not a question of a unique concession made to particular persons, but it was a concession based on law, which denoted a certain kind of universality. Summenhart argues that original law conceded the original dominion to the First Parents and would concede it in the same way to all their descendants so long as they remained in the state of original justice. The decisive factor was the foundation of dominion; the law concedes dominion whenever the foundation is present. Summenhart concludes that when the First Parents forfeited their original justice, they also lost the right to live in Paradise and eat of its trees.[38]

As Summenhart continues his discussion, it becomes increasingly apparent that this right to live in Paradise is not merely an example of original dominion, but also that original dominion is confined to this right in a specific sense. What creates and enforces this impression is the way Summenhart distinguishes original dominion from the natural dominion possessed by man. This distinction emerges already in his explanation of the characteristic "directly from God." Summenhart maintains that this feature differentiates original dominion, not only from the civil dominion, but also from "some instances of the natural dominion."[39] According to him, there are two kinds of natural dominion. Some species of natural dominion are "directly from God," while others are "indirectly from God and directly from

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[37] *Opus septipartitum*, q. 2, sig. B1v: "Exemplum, quando primi parentes habuerunt originalem iusticiam, ratione illius iusticie conveniebat eis ius edendi de omni ligno paradisi, dempto ligno scientie boni et mali, et ibidem habitandi et alia ibi agendi. Et hoc dominium fuit concessum primo homini, quando dixit ei dominus Gen. ii, De omni ligno paradisi comedetis."

[38] *Opus septipartitum*, q. 2, sig. B1v: "Unde et leges originalis iusticie hoc ius concedebant eis et quibuscunque aliis posteris eorum qui habuissent originalem iusticiam quam diu illam retinerent, ipsa vero perdita spoliarentur etiam illo dominio, sicut et eis contigit quia primi parentes amissa originali iusticia perdiderunt ius habitandi in paradiso et comedendi de lignis eius. Unde et inde expulsi fuerunt, Gen. iii."

[39] Summenhart states that when a person buys a horse, he acquires civil dominion over the horse. According to civil law, this dominion is based on the purchase as well as on the delivery of the horse from the previous owner. The point is that this "purchase is an act that originates directly from man. And as the foundation or title of this dominion is not directly from God, neither is civil dominion itself." *Opus septipartitum*, q. 2, sig. B2r: "Nam dominium civile convenit suo subiecto mediate a deo, et immediate ab homine, ut quod quis civiliter habet dominium equi empti est secundum leges civiles ratione emptionis et traditionis a dominium eiusdem… Emptio autem est actus ab homine immediate elicitus. Et sic sicut fundamentum vel titulus illius dominii est non immediate a deo, sic nec ipsum dominium civile."

man." It is characteristic of Summenhart's analysis that he acknowledges this distinction with a reference to the foundation of dominion. When the foundation is directly of God, so is the dominion, and when the foundation is directly from man, so is the dominion. As an example of the latter, Summenhart mentions a father's dominion over his son. "A father's dominion over a son is appropriate to the father by reason of having begotten the son. And that he has begotten the son this is appropriate to him directly from himself, and mediately from God." As an example of dominion that "is appropriate to its subject directly from God," Summenhart takes "the dominion which the will has toward the lower potencies, because the nature of will is directly from God."[40]

Summenhart's explanation of the characteristic of being "able to belong equally to several" illustrates his view of original dominion as an inclusive relation vis-à-vis material things. Original dominion, he writes, belonged equally to all the right-holders:

> Whence all of those who had original justice had dominion over the same things in Paradise so that everyone had the same species of dominion with respect to the same thing. For although this dominion was given to Adam as the first, the principal, father of the house in the house of the human race, as Alexander of Hales says in the second part of his *Summa*, however, it was not given in the way that would in some way violate the communion of all where every act of using was oriented according to the rightly formed will.[41]

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[40] *Opus septipartitum*, q. 2, sig. B2r: "Similiter aliquod naturale convenit suo subiecto mediate a deo, et immediate ab homine, scilicet illud cuius fundamentum vel titulus convenit subiecto mediate a deo, et immediate ab homine, ut dominium patris in filium convenit patri, ratione illius, quia genuit illum. Genuisse autem eum convenit patri immediate a se, et mediate a deo. Et dico notanter aliquod dominium naturale, quia aliquod naturale dominium convenit etiam immediate suo subiecto scilicet illud cuius fundamentum convenit immediate sibi a deo, ut dominium quod voluntas habet in potentias inferiores, eo quod natura voluntatis immediate est a deo." A father's dominion and the dominion of the will are Summenhart's favorite examples of natural dominion. However, there is a certain disparity between these two instances of natural dominion. The will's dominion seems to be factual in nature, whereas the father's dominion over his son is readily understood as a normative relationship that gives rise to certain obligations and actions. It is characteristic of Summenhart's approach that, for him, the difference between the father's dominion and the dominion of the will does not appear as a difference between dominion as a right and dominion as a fact, but merely arises when natural dominion is classified in light of the characterization "directly from God."

[41] *Opus septipartitum*, q. 2, sig. B2r: "… unde quotquot habuissent originalem iusticiam, omnes habuissent earundem rerum paradisi dominium ita quod quilibet insolidum fuisset eadem specie dominii dominus illius rei cuius alius fuisset dominus,

The first sentence in this passage makes it clear that Summenhart understands the original community of all in terms of individual rights or dominions. Original dominion was not a single dominion shared by all, but instead "everyone had the same species of dominion with respect to the same thing." With the reference to Adam as master of the house of the human race, Summenhart touches on the political implications of original dominion. Yet his interest lies in property relations and not in government, and he views Adam's special position from the standpoint of whether it could have affected other men's relationships to the things of Paradise.[42]

In discussing the foundation of original dominion, Summenhart clarifies its relation to divine charity, a subject prompted by Fitzralph's conclusions. Summenhart stresses that original dominion was not necessarily founded on charity. This had also been one of Gerson's criticisms of Fitzralph. Summenhart reasons that original dominion was founded on the original justice, from which it follows that it was not founded on charity, because original justice "does not have a necessary connection to charity."[43] To demonstrate, he applies a temporal distinction that reveals a detail of his theology. Summenhart's view was that man was not created in grace, but grace was subsequently bestowed on man by a distinct, divine act. From this position he points out that First Parents received the original dominion on the grounds of original justice at a time when they did not yet possess divine charity. Thus, original justice preceded charity, which shows that charity and original justice were distinct and not necessarily related. Summenhart admits though, that after the First Parents had obtained charity, original dominion was lost through the loss of charity. This was because

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quamvis enim illud dominium collatum fuerit Ade tanquam primo et principali patrifamilias in domo generis humani ut dicit Alexander in secunda parte summe, tamen non sic datum fuit ut in aliquo preiudicaret communioni omnium qua unusquisque illis usus fuisset secundum beneplacitum voluntatis ordinate." Summenhart follows Alexander here in referring to the terminology of the canon lawyer Huguccio. Ibid.: "Unde illud non fuit dominium proprietatis possessorie, sed presidentie potestative et providentie regitive ut vult Huguccio."

[42] Summenhart implicitly recognizes that the community of all is the seat of potential conflict of interest in regard to the use of things. In Paradise these conflicts did not become actual, despite Adam's pre-eminence, because "every act of using was oriented according to the rightly formed will."

[43] *Opus septipartitum*, sig. B2r: "Et in hoc patet quod illud dominium erat non necessario fundatum in charitate, quia erat fundatum in originali iustitia. Hec autem non habet necessario annexam charitatem."

the loss of charity was necessarily related to the loss of original justice in the sense that the First Parents "were not to lose charity unless by losing original justice."[44]

This description illustrates how Summenhart understands the notion of the inalienability of dominion. In general, the expression "inalienable right or dominion" obtains its meaning through the contrast with alienable civil dominion. The basic meaning of "inalienable" is that the right-holder cannot transfer his dominion to another person. Thus, an inalienable right or dominion does not connect the right-holder to the network of inter-personal exchange relationships. This does not mean that one could not lose one's inalienable dominion, as the example of original dominion demonstrates. The main point is that inalienability is conditional. It is connected to the presence of the foundation of dominion, as Summenhart explains in discussing beatific dominion: "as long as one has the foundation or title of this dominion, one will inevitably have that" dominion.[45] The conditional character of inalienability is a direct consequence of the necessary relation that exists between the dominion and its foundation: a dominion cannot be present without its foundation.[46] This again highlights the centrality of the notion of foundation in Summenhart's view.

Original dominion vs. natural dominion

In the course of his discussion, Summenhart expresses his criticism of and dissatisfaction with Gerson's language concerning the relationship

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[44] *Opus septipartitum*, sig. B2r: "Unde hoc dominium infuit primis parentibus quando habuerunt iusticiam originalem nondum habita charitate vel gratia, licet post adeptionem charitatis perderetur per perditionem charitatis, quia charitatem non erant perdituri nisi simul perderent iusticiam originalem."

[45] *Opus septipartitum*, q. 2, sig. B1v: "Quinto dicitur, servata beatitudine cuius sensus est, quamdiu habet quis fundamentum vel titulum illius domininii, tam diu habebit inevitabiliter illud."

[46] This conditional character of inalienability means that inalienability works to differentiate respective dominion from all other species of dominion. Although several species of dominion are inalienable, each has a different foundation, and therefore each is inalienable in a different condition. *Opus septipartitum*, q. 2, sig. B1v: "In hoc distinguitur ab aliis dominiis, quia licet aliqua dominia alia etiam sint inabdicabilia ut est dominium originale, naturale et charitativum, seu evangelicum, non tamen consistit eorum inabdicabilitas in retentione beatitudinis, eo quod non fundantur in beatitudine, sed consistunt in aliis fundamentis ut gratificum seu charitativum in charitatis retentione. Quamdiu enim illa adest tam diu durat dominium charitativum, sive assit beatitudo sive non. Sic inabdicabilitas dominii naturalis consistit in retentione naturalis doni, quam diu enim illud aderit, tam diu aderit dominium naturale sive assit beatitudo sive non."

between original and natural dominion. In *De vita spirituali animae*, Gerson stated that original dominion was founded on original justice, but he did not take a stand on the question of whether original justice was a part of man's nature or something additional to it. However, Gerson explicitly treated original dominion as man's natural dominion in the state of instituted nature.[47] In contrast to Gerson's position, Summenhart sees original dominion and natural dominion as distinct species and criticizes Gerson's language from this basic position. A point of criticism, albeit implicit, can be found in his presentation of the description of original dominion in *De vita spirituali animae*, for Summenhart's version was not exactly identical with Gerson's original. Gerson defined the inalienability of original *dominium* by stating that original dominion is "inalienable when original justice or natural integrity is preserved."[48] Summenhart's version of the description, as stated above, did not include a reference to "natural integrity." This omission could be taken as deliberate, for it contributed to separation of original dominion from natural dominion, which Summenhart sought to maintain. Any suggestion that original dominion was founded on man's nature would have been disturbing from this point of view.

Summenhart's criticism of Gerson's language becomes explicit in a corollary section, motivated by his exegesis on the text of *De vita spirituali animae*. Summenhart refers to two consecutive passages in Gerson's text, which for him appear problematic. The first speaks of the specific dominion given by the Lord (according to Genesis 1) when he said to the First Parents: "be masters of the fish of the sea and the birds of the air." For Gerson, this was an example of original dominion, and he coupled it with the dominion to eat of the trees of Paradise (excluding the tree of knowledge).[49] Summenhart disagrees:

> It should be said that, although Johannes Gerson took this as an example, the opposite seems to be true—simply and without qualification. Because if it were an original dominion, then it would have been destroyed when

[47] See chapter 1.7. above.

[48] Gerson, *De vita spirituali animae*, lectio 3, 29: "Erit igitur naturale Dominium donum Dei quo creatura jus habet immediate a Deo assumere res alias inferiores in sui usum & conservationem, pluribus competens ex aequo & inabdicabile, servata originali Justitia seu integritate naturali."

[49] *Opus septipartitum*, q. 2, sig. B2v. "Hic duo sunt videnda. Primo utrum illud dominium etiam fuerit originale, quod contulit dominus primis parentibus cum ait Genesis, i. Dominamini piscibus maris et volatilibus celi." See Gerson, *De vita spirituali animae*, lectio 3, 29.

> original justice was destroyed; as the right of living in Paradise and eating of its trees was destroyed, the consequence is false, since even after the expulsion from Paradise, men had the right to take fish and birds for their use.[50]

Summenhart's argument works on the premise that *ius* and *dominium* are conceived as equivalent. In Paradise the First Parents had dominion to take fish and birds for their use, and after the expulsion from Paradise they had the right to take fish and birds for their use. From this it follows that dominion over the fish and birds is a natural dominion.

Summenhart does not, however, totally reject Gerson's interpretation. He suggests that Gerson's point was correct, if by it is understood that "the Lord by the words mentioned above granted them a certain *dominium*, which was more perfect than the one they had after the Fall." Under this *dominium* all the animals were obedient to them; the First Parents could use animals "with all facility according to their wishes," and "they had *ius* that no animal could harm them."[51] Nevertheless, Summenhart emphasizes that without this additional qualification, the First Parents' right to utilize animals was a manifestation of their natural dominion. "For it belongs to man on grounds of his nature."[52]

Summenhart provides further textual evidence to support his interpretation. He refers to the same passage in Genesis 1 and notes that immediately after the above-mentioned dominion, "another natural dominion is mentioned, which was also conceded to the animals, when it is said: 'Behold, I have given every herb bearing seed, etc., for you to eat and also to every beast of the earth, and to every bird of the

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[50] *Opus septipartitum*, q. 2, sig. B2v: "Dicendum quod quamvis Johannes Gerson de hoc exemplificet, tamen simpliciter seu sine addito loquendo, oppositum videtur verum, quia si illud fuisset originale dominium, tunc illud perdidissent perdita originali iusticia, sicut tunc perdiderunt ius habitandi in paradiso, et comedendi de lignis eius, consequens est falsum, quia etiam post expulsionem de paradiso habuerunt ius capiendi pisces et aves in sui usum."

[51] *Opus septipartitum*, q. 2, sig. B2v: "Nisi dicatur quod dominus predictis verbis contulit eis quodam singularius dominium super pisces et volucres quam habuerunt post peccatum, scilicet quod cum omni facilitate ad votum eorum potuissent cepisse congregasse et advocasse omnia ad usum suum… Vel dicatur quod locutus sit dominus de dominio quo parentes servata originali iusticia habuissent ius ut nullus animalium eis nocere potuisset, sic inquam verum esset."

[52] *Opus septipartitum*, q. 2, sig. B2v: "Secus autem ipsum intelligendo, predictum dominium debebit dici naturale, quod scilicet competit homini ratione nature sue."

air, and to all things that move upon the earth and possesa a living soul, for them to eat.'" According to Summenhart, "it is apparent that the right of the beasts and birds to the fruits of the earth was nothing other than a natural dominion."[53]

The other example of man's dominion, which—according to Summenhart—Gerson had erroneously associated with original dominion, belongs to the inner reality of the rational human soul.

> While giving examples of original dominion, the same Johannes Gerson said that a parallel can be drawn between this *dominium* and the dominion of liberty, which is a faculty freely resulting from God's gift freely donating itself, to acting or not acting, together with the rational soul, in the production of its eliciting acts or in the suspension of them for obtaining the end of beatific enjoyment. And this [faculty] is the freer and the greater the less one is capable of evil, and inasmuch as one is confirmed to good or in good through good *habitus*.[54]

Here Summenhart quotes Gerson's detailed description of the dominion of liberty word for word. The dominion of liberty is a faculty of action that (together with the rational soul) enables man to act in a goal-oriented way in order to attain eternal bliss. It is characteristic of this faculty that it is free, and by freedom it is meant—with Augustinian emphasis—freedom from sin and the liberty to do good.[55]

It is useful to note that in *De vita spirituali animae*, Gerson did not claim that the dominion of liberty was destroyed by the Fall of mankind. On the contrary, he took the dominion of liberty as an example

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[53] *Opus septipartitum*, q. 2, sig. B2v: "Unde et ibidem statim postea tangitur aliud dominium naturale, etiam bestiis tunc concessum, cum dicitur. Ecce dedi vobis omnem herbam afferentem semen etc. ut sint vobis in escam et cunctis animantibus terre, omnique volucri celi et universis que moventur in terra, et in quibus est anima vivens ut habeant ad vescendum. Constat autem quod ius quod bestie et volucres habent in terrenascentia, non est nisi naturale dominium, de illo autem dicetur in secundo modo dividendi." The idiom that is clearly present in this passage is the equivalence of *ius* with *dominium*, which enables Summenhart to credit animals with having dominion over the fruits of the earth. It is characteristic of his approach that he does not make any categorical difference between men and animals as far as natural right or dominion is concerned.

[54] *Opus septipartitum*, q. 2, sig. B2v: "…quod idem Johannes Gerson, exemplificando de originali dominio dicit quod ad hoc dominium spectare potest dominium libertatis, que est facultas quedam libere resultans ex dono dei liberaliter se donantis ad agendum vel non agendum cum anima rationali, in productione suorum actuum elicitorum vel eorum suspensione ad finem beatissime fruitionis obtinendum. Et tanto liberius est et latius, quanto minus potest in malum, et quanto per bonos habitus est ad bonum vel in bono stabilitum."

[55] See Gerson, *De vita spirituali animae*, lectio 3, 29.

of dominion that continued its existence from the pristine to the corrupted state of man's nature. The object of Summenhart's criticism was not, however, Gerson's view of the dominion of liberty after the Fall, but rather the way Gerson treated the dominion of liberty as original dominion before the Fall. Summenhart's argument follows a pattern similar to the previous example. He insists that it is not true, *simpliciter* or without additional qualifications, that *dominium libertatis* represents original dominion; for if it were original, then it would have been destroyed together with the original justice. And this is not what happened, since even after the Fall, the First Parents "had the faculty of eliciting human acts or suspending them, to the extent that after the sin, they had *liberum arbitrium* and could both sin and do good."[56] Here again, Summenhart's argument rests on the equivalence of *dominium* and *ius* in which *dominium* is understood as a faculty of action rather than as a relation of sovereign dominance. The very existence of *liberum arbitrium* after the Fall demonstrates that the dominion of liberty was not lost in the Fall. Consequently, the dominion of liberty could not represent original dominion.

As before, Summenhart recognizes the deterioration that took place in man's dominion (of liberty) with the Fall. He admits that the dominion of liberty can be conceived as original dominion, if the "dominion of liberty" is understood "as concerning that dominion of liberty by which the will masters inferior potencies and their acts in a more perfect way than now, viz., without all the resistance and rebellion that nowadays is in inferior men." The bottom line, however, is that this interpretation presupposes an additional qualification for "dominion of liberty." According to Summenhart, dominion of liberty, simply and without qualifications is "a species of natural *dominium*."[57]

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[56] *Opus septipartitum*, q. 2, sig. B2v: "Sed nec hoc dictum est simpliciter et sine addito verum, quia si illud fuisset originale, fuisset perditum perdita iusticia originali, sed consequens est falsum, quia etiam post peccatum primi parentes ex dono libertatis concreate eis, et generali concursu dei quo disposuit se velle cooperari creaturis suis habuerunt facultatem eliciendi actus humanos vel suspendendi eos, eo quod post peccatum adhuc habuerunt liberum arbitrium et potuerunt peccare et bene agere."

[57] *Opus septipartitum*, q. 2, sig. B3r: "Unde si verum debeat esse, oportet illud intelligere de illo dominio libertatis, quo voluntas super potentias inferiores et earum actus dominabatur singulariori modo quam nunc, scilicet sine tanta resistantia et rebellione, quanta nunc est in viribus inferioribus. Hoc inquam dominium fuit originale. Unde et perdita iusticia originali simul perditum est illud. Secus autem intelligendo predictum dominium est species dominii naturalis."

3.1.3. *The dominion of grace or charity*

The starting point for Summenhart's discussion of the dominion of grace differs from the species discussed thus far. The reason is that *dominium gratificum*, as it is presented in *De potestate ecclesiastica*, did not appear in the theory of *De vita spirituali animae*. This meant that before Summenhart could proceed in his commentary, he needed to identify the dominion of grace and explain how it is related to Gerson's theory in *De vita spirituali animae*. Summenhart fulfills this need at the very beginning of his account.

> The dominion of grace is described as follows: It is dominion according to the law of gratifying grace. Thus, the dominion of grace is the very same which in another way is called "dominion founded on the title of gratifying grace" or on the title of charity, that is, one which has charity as its title or foundation.[58]

Here, Summenhart explains the semantic connections within Gerson's language by connecting the dominion of grace to two distinct classifications of dominion. He refers to the "dominion founded on the title of gratifying grace," which was a species specified in the threefold classification of dominion in *De potestate ecclesiastica*.[59] Further, by assimilating gratifying grace with charity, Summenhart connects the dominion of grace to the theory of *De vita spirituali animae*, for Gerson had made a similar association, maintaining that God gave himself to man in the gift of gratifying grace or charity.[60] Although Gerson did not call the dominion based on grace or charity the dominion of grace, but rather the evangelical dominion, the connection is apparent and leads Summenhart to associate the dominion of grace with Gerson's account of evangelical dominion.

Summenhart completes this assimilation with his own definition, which is based on Gerson's descriptions of the dominion of grace and the evangelical dominion. Accordingly, the dominion of grace:

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[58] *Opus septipartitum*, q. 2, sig. B3r: "Dominium gratificum sic describitur. Est dominium secundum leges gratie gratificantis. Et sic dominium gratificum est illud idem quod alius vocatur dominium fundatum in titulo gratie gratum facientis seu in titulo charitatis, id est quod pro titulo seu fundamento habet charitatem."

[59] Gerson, *De potestate ecclesiastica*, consideratio 13, 253: "Possumus autem contractius loqui de triplici Dominio, quorum unum fundatur in titulo charitatis gratificantis…"

[60] Gerson, *De vita spirituali animae*, lectio 3, 30: "Deinde tertio modo dat se Deus in dono charitatis seu gratiae gratum facientis…"

> …is dominion, directly from God, appropriate according to the law of charity and by reason of charity to the one who is in that [charity], is able to belong equally to several or capable of existing simultaneously and equally in many lords, is inalienable whenever charity is preserved, extending itself to everything.[61]

Summenhart's interpretation of the description of the dominion of grace from *De potestate ecclesiastica* is contained in the characterization "appropriate according to the law of charity, and by reason of charity to the one who is in that charity." In *De vita spirituali animae* evangelical dominion was characterized as "immediately from God," "capable of existing simultaneously and equally in many lords," and "inalienable when charity is preserved."[62] Summenhart explains these clauses and their rationale following the basic principles he has explicated in discussing beatific and original dominion. [63]

Summenhart's explanation of the inalienability of the dominion of grace shows a novel emphasis, which is related to the right-holder's ability to alienate one's dominion voluntarily by abdicating its foundation. First, Summenhart makes explicit the basic principle that, "as the dominion of grace is not had without having charity, it is not lost without losing it." To this basic idea, he adds that "charity cannot be lost against one's will, nor can this dominion be taken away against one's will."[64] As a consequence of this voluntary aspect, Summenhart concludes—following Gerson—that the one who loses the dominion of grace is a traitor. This is because, the person has voluntarily abdicated charity and the dominion of charity, which makes him "guilty

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[61] *Opus septipartitum*, q. 2, sig. B3r: "Est dominium immediate a deo, conveniens secundum leges charitatis et ratione charitatis ei qui est in illa competens pluribus ex equo seu compatiens secum ex equo plures dominos inabdicabile servata charitate extendens se ad omnia."

[62] Gerson, *De vita spirituali animae*, lectio 3, 30. The exact expression in *De vita spirituali animae* was "capable of existing simultaneously and equally in any lord whatever (*quodlibet dominos*)." As Gerson did, Summenhart too explains this with a biblical reference: "because charity does not seek its own, the dominion of charity is able to belong equally to several without its diminution." *Opus septipartitum*, q. 2, sig. B3r.

[63] *Opus septipartitum*, q. 2, sig. B3r.

[64] *Opus septipartitum*, q. 2, sig. B3r: "Unde illud dominium sicut non habetur non habita charitate, sic non perditur nisi perdita ea, quare sicut charitas perdi non potest ab invito, sic nec illud dominium potest tolli ab invito, in quo differt a civili dominio vel iure quam et civili potest tolli ab invito ut ius possessionis tollitur aliquando invito…" Summenhart notes here that this is another difference from civil dominion or right, because civil dominion or right, as, for example, the right of possession, can sometimes be taken away against the will of the right-holder.

of a crime against majesty and infamous before God and his angels as well as against the whole curia of the blessed."[65]

Summenhart's definition of the dominion of grace also includes a special characteristic: "extending itself to everything." This clause did not appear in the description of evangelical dominion in *De vita spirituale animae*, but Gerson included it when repeating his description in *De potestate ecclesiastica*.[66] According to Summenhart, this clause speaks of the latitude of the dominion of grace. By this he means that as far as the object of the dominion relation is concerned, the dominion of grace has no limits. As such, the latitude of the dominion of grace is superior and beyond compare among the species of dominion that man can possess in this life.[67]

These central characteristics of the dominion of grace are spelled out in an example that Summenhart formulates as follows:

> Example: because of the very fact that a person is in God's charity, which makes him worthy and a friend of God, he has the right of taking all created things for his use according to the law of charity, which law concedes, on account of charity or by reason of charity, to a person who has that charity, the use of all things in a certain way so that these are used for the glory of God and for his own salvation, to the extent that is appropriate for him according to charity… And what is so strange if the one, who is in God's charity, has some right and dominion over all God's creatures, for by charity such [a person] is already made a friend

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[65] *Opus septipartitum*, q. 2, sig. B3r: "…unde perdens gratificum dominium sit proditor, et reus lese maiestatis et infamis coram deo et angelis eius et tota curia beatorum."

[66] In *De vita spirituali animae*, Gerson did refer to the all-embracing latitude of evangelical dominion, and he added the characteristic to the description when he repeated it in *De potestate ecclesiastica*. Cf. Gerson, *De vita spirituali animae*, lectio 3, 30, and *De potestate ecclesiastica*, consideratio 13, 253.

[67] *Opus septipartitum*, q. 2, sig. B3v: "Dicitur ultimo, extendens se ad omnia, in qua clausula habetur illius dominii latitudo, que tanta est quod prospera omnia et adversa in eius ditione sunt posita, quia diligentibus deum omnia cooperantur in bonum. Unde illius dominii latitudo excedit latitudinem omnium aliorum dominiorum saltem convenientium viatoribus, patet, nam originale dominium non extendabat se ad omnia, nec canonicum nec civile se ad omnia extendit, sed nec naturale dominium conveniens creature se ad omnia extendit. Et dico conveniens creature, quia naturale dominium conveniens deo quo deus ratione nature sue divine dominatur omni creature, est omnium dominiorum latissimum. Dixi etiam saltem convenientium viatoribus. Nam dominium beatificum etiam se extendit ad omnia, eo quod ratione beatitudinis ipsi sunt coheredes Christi, sed nec illud est sine dono charitatis sed includens ipsum sicut nec est beatitudo sine charitate." On God's natural dominion, see chapter 3.2.2. below.

> of God. And everything is common among friends, as Aristotle says in the 9th book of *Ethics*, chapter 8.[68]

Here, Summenhart describes divine charity by saying that it makes its possessor a friend of God. Although the association of divine charity with friendship was no novelty in medieval theological thought, it is noteworthy that Jean Gerson had not made use of this association in *De vita spirituali animae*.[69] Gerson had instead referred to the idea of *filialis adoptio*, which was another common idiom in this context. According to Gerson, gratifying grace or charity is accompanied by *filialis adoptio*, i.e., man's adoption as God's son, which gives man a hereditary right (*ius ad rem*) to all of God's things.[70] Summenhart's reasons for not following Gerson here are not spelled out but they are not difficult to divine. The relevant difference between friendship and *filialis adoptio* is that, whereas *filialis adoptio* is a juridical act that will establish a legal relation between the adopter and the adoptee, friendship is an extra-juridical relation in a distinctive way. In speaking of friendship in the context of charity, Summenhart avoids promoting the concept that the dominion of grace is a hereditary right that has its foundation in *filialis adoptio*. He consistently adheres to the idea that the dominion of grace has its foundation in divine charity. In Summenhart's view, God shares his creation with man by this dominion in the way friends do. It is not a question of God transferring his legal title or his real lordship to man (as Fitzralph had suggested).

Apart from this difference, Summenhart's understanding of dominion based on God's grace does not differ from Gerson's. The accounts of both writers are characterized by the cultivation of biblical narrative, which for its part sheds light on the nature of the dominion of grace:

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[68] *Opus septipartitum*, q. 2, sig. B3r: "Exemplum, eoipso quod quis est in charitate dei que eum facit gratum et amicum deo, habet ius assumendi omnes res creatas ad sui usum secundum legem charitatis que lex concedit propter charitatem vel ratione charitatis habenti eadem certo modo usum omnium rerum ut eis ad dei gloriam et sui salutatem utatur, quantum sibi congruit secundum charitatem… Et quid mirum si existens in charitate dei, habet aliquod ius et dominium in omnibus creaturis dei, cum talis sit iam per charitatem factus amicus dei. Amicorum autem omnia sunt communia, ait Aristoteles IX ethicorum, c. VIII." See Aristotle, *Ethica Nicomachea*, VIII, 6 (1159b30).

[69] The association of divine charity with friendship was maintained especially by those medieval authors who were strongly influenced by Aristotle's writing on friendship, for example, Thomas Aquinas. See Aquinas, *Summa theologiae*, 2a2ae, q. 23, a. 1.

[70] Gerson, *De vita spirituali animae*, lectio 3, 30: "…quoniam sit per eam adoptio filialis, jus praebens haereditarium ad omnia bona Dei possidenda…"

> Apostles and others who were in charity had this dominion and right on the grounds of charity, as Paul said in speaking of himself and others (2. Cor. 6.): "having nothing and yet possessing everything," supplement: by the dominion of grace or charity.… And also (1. Tim., 6.): "[God] gives us all in abundance." Whence to the title of charity there is added—for enjoying and using in abundance—all that are in the heaven, and on the earth, and that are in all the depths of the sea.[71]

Here, Summenhart suggests that the dominion of grace is a usufructuary right in all of God's creation. Although God is the sole *dominus*, man has by charity the entitlement for enjoying and using (*fruendi et utendi*) all in abundance. It seems obvious, though, that the juridical tone of this kind of association should not be emphasized at the expense of the general narrative, which is theological and biblical in nature. Summenhart does not suggest that such a usufruct could make any claims in regard to the civil or even natural possession of the things of this world. In Summenhart's view *dominium gratificum* is characterized by a personal *dominium* that carries the connotation of otherworldliness in the paradox of having nothing, yet possessing everything.[72]

3.1.4. *Evangelical dominion*

What does the term "evangelical dominion" stand for? The starting point for Summenhart's discussion is the ambiguity in the text of *De potestate ecclesiastica*. In the six-fold classification of dominion, evangelical dominion was explicitly differentiated from the dominion of grace or charity. Yet, immediately after introducing it, Gerson restated his earlier description, which associated evangelical dominion with the presence of divine charity, thereby confusing the distinction anew.[73]

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[71] *Opus septipartitum*, q. 2, sig. B3r: "Hoc dominium et ius habebant ratione charitatis apostoli et ceteri in charitate existentes cum in persona sua et aliorum dicebat Paulus, II ad Corinthios, VI. Tanquam nihil habentes et omnia possidentes, supple dominio gratifico vel charitativo.… Et I ad Timotheum, VI. Prestat nobis omnia abunde. Unde ad titulum charitatis adiiciuntur omnia abunde ad fruendum et utendum que in celis sunt, et que in terris, et que in omnibus abissis." Cf. Gerson, *De vita spirituali animae*, lectio 3, 30.

[72] In another chapter, Summenhart, referring to Gerson, points out that divine charity and its effects are often clarified metaphorically by using language that is congruent with speaking of civil dominion. *Opus septipartitum*, q. 2, sig. B3v: "Sacra scriptura multotiens transfert sub metaphoricis tropis dominium civile cum suis attinentiis ad hoc dominium charitatis…"

[73] Gerson, *De potestate ecclesiastica*, consideratio 13, 253.

Summenhart calls attention to this ambiguity by introducing two descriptions.

> Evangelical dominion is described as follows: it is dominion according to the proper law of the evangel. And a little later after introducing this, Johannes Gerson gave it another definition, saying: But this dominion that many people call, through appropriation, evangelical is described as dominion, instituted directly by God, capable of existing simultaneously in many lords equally, inalienable when the charity is preserved, extending itself to everything.[74]

Summenhart refutes the second definition altogether, noting that it arises from an equivocal use of the term "evangelical dominion," which might be plausible in another context, but is inapplicable in the context of the six-fold dominion. This is because evangelical dominion would then coincide with the dominion of grace from which it should differ as a distinct species.[75]

The first definition does not escape Summenhart's criticism either; the problem is that it is too general. He notes that it can lead to a broad conception in which evangelical dominion appears as the genus of the dominion of grace and not as a distinct species at the same conceptual level.[76] Of the dominion of grace, it can justly be said that "evangelical law concedes this dominion to those who love God."[77] But

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[74] *Opus septipartitum*, q. 2, sig. B3v: "Dominium evangelicum sic describitur. Est dominium secundum legem proprie evangelicum. Et Johannes Gerson paulopost illam datam, aliam dando ait. Describitur autem dominium quod appellatur a multis evangelicum per appropriationem quod est dominium immediate a deo institutum compatiens secum ex equo quotlibet dominos, et inabdicabile, servata charitate se extendens ad omnia."

[75] *Opus septipartitum*, q. 2, sig. B3v: "Primum quod hoc secundo modo describendo dominium evangelicum est idem adequate cum dominio gratifico, quia hec est eadem descriptio cum secunda descriptione dominii gratifici supra data. Secundum dictum, hec descriptio dominii evangelici est inconveniens in hoc loco, quia in hoc loco loquendum est de evangelico tanquam de dominio distincto specie a dominio gratifico, quia ponitur tanquam species distincta ex equo contra alias quinque in hoc modo dividendi positas."

[76] *Opus septipartitum*, q. 2, sig. B4r: "Et sic iterum non capitur hic in hoc modo dividendi, quia tunc quarta species non distingueretur ex equo contra tertiam, sed quarta esset genus ad tertiam speciem, quod fieri non debet in divisione alicuius in sua inferiora."

[77] *Opus septipartitum*, q. 2, sig. B4r: "Et hoc modo idem est quod dominium concessum alicui secundum legem evangelicam, et hoc modo dupliciter capitur. Primo generaliter prout est dominium concessum alicui secundum legem evangelicam, non curando an secundum legem que sit proprie et pure evangelica, vel non, et non curando an secundum solam evangelicam legem vel etiam secundum aliam. Et hoc modo etiam comprehendit sub se dominium charitativum, quia illud conceditur etiam secundum

Summenhart points out that the dominion of grace would not deserve the title "evangelical dominion" any more than other dominions, which evangelical law concedes to men. What he has in mind here are "the dominions that were conceded to the apostles when ecclesiastical power was handed over to them." These dominions, "which Gerson called by the name of *dominium ecclesiasticum*," would also exemplify evangelical dominion in that broad sense of the term.[78] To save Gerson's approach and remedy the situation, Summenhart specifies the criteria related to the concept of evangelical law. By "evangelical dominion," he says, should be understood that "dominion that is appropriate to someone according to the pure law of the evangel and only according to the law of the evangel." He points out that this exclusionary definition indicates that the dominion of grace cannot be called evangelical dominion, because this was already conceded by the Old Law, albeit imperfectly.[79] Consequently, the equivocality of the term "evangelical dominion" is eliminated because there is only a single kind of dominion that corresponds to the term "evangelical dominion." Summenhart concludes that "in this way evangelical dominion is nothing other than ecclesiastical power."[80]

Potestas ecclesiastica *as* dominium evangelicum

Without actually defining what he means by "evangelical law," Summenhart identifies evangelical dominion with ecclesiastical power. This identification leads him into a long excursion on the major theme

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illam legem. Lex enim evangelica concedit dominium illis qui diligunt deum, ut patet per auctoritates apostoli supra allegatas qui et ipse fuit predicator evangelice legis."

[78] *Opus septipartitum*, q. 2, sig. B3v: "…tamen propter hoc illud nomen scilicet evangelicum dominium non debebat appropriari dominio charitativo plus quam aliis dominiis concessis per legem evangelicam qualia sunt dominia concessa apostolis quando eis potestas ecclesiastica fuit tradita quam idem Johannes alius vocat dominium ecclesiasticum…"

[79] In another paragraph Summenhart explains that before evangelical law was disseminated, there were those who possessed the dominion of grace. This was because during that time there were people who were in God's charity, and they necessarily possessed the dominion of grace or charity. The law of the evangel made the dominion of grace more perfect, in the sense that before the advent of Christ, those people who were in God's charity did not have a proximate power to enjoy God as fully as now, nor could they enter the place for the blessed after death. *Opus septipartitum*, q. 2, sig. B3v.

[80] *Opus septipartitum*, q. 2, sig. B4r: "Alio modo accipitur pro domino conveniente alicui secundum legem pure evangelicam et solum secundum legem evangelicam. Et per hoc quod dico solum, excluditur dominium gratificum vel charitativum. Et hoc modo dominium evangelicum nihil aliud est quam potestas ecclesiastica."

of Gerson's *De potestate ecclesiastica*. Simply in terms of written pages, Summenhart's discussion of *potestas ecclesiastica* as evangelical dominion dominates the entire exposition of the species of dominion: More than half of the pages are dedicated to discussion of evangelical dominion, of which the excursion into *potestas ecclesiastica* also occupies more than half. One might expect this to be the perfect occasion for Summenhart to follow Gerson's lead and declare his stand in the debate between conciliarists and papalists concerning ecclesiastical jurisdiction. After all, Summenhart, who was not without ambitions in church politics, had studied in Paris at a time when the university was one of the strongholds of the conciliar movement. Thereafter, Summenhart became a follower of Gerson (*Gersonis imitator*), who had been one of the leading figures in fifteenth-century conciliarism.[81] And, after the failure of the Council of Basel/Florence (1431–1445) and the strengthening of the papalist side at the end of the century, the plausibility of the conciliarist agenda, so it seems, could have gained from a well-articulated defense. Against this background, it is striking that Summenhart's account does not take any independent stand, either for or against the conciliarist agenda. Actually, his treatment of ecclesiastical power does not involve him at all in the confrontation between conciliarists and papalists, which had grown into the most significant constitutional debate of the fifteenth century.[82]

While it is difficult to know Summenhart's intentions as to whether this neutrality was something for which he intentionally strove, it can be observed that he did not reach this position by accident. While acting as a commentator on Gerson, he consciously promoted a special view of ecclesiastical power that concomitantly placed him in a neutral area when it came to the debate on ecclesiastical jurisdiction. One reason is that Summenhart approached Gerson's account from a specific angle with more formal than practical interests. His commentary on was conditioned by the framework of the six-member classification of dominion: His aim is to render an account of *potestas ecclesiastica* as *dominium evangelicum,* which will provide the ingredients for describing evangelical dominion vis-à-vis other species of dominion. This suggests that Summenhart's primary interest does not lie in

[81] *Gersonis imitator* is how Philipp Melanchthon characterized Summenhart, who had been one of his teachers in Tübingen. Kisch 1967, 292.

[82] For a useful introduction to this debate, see Tierney 1955; Oakley 2003.

substantial questions concerning jurisdictional power and its proper location in the church or the relationship between the general council and the papacy, which for Gerson were of the highest importance. Rather Summenhart's commentary focuses on the distinctions and classifications that Gerson made (in *consideratio prima* and *secunda*) in order to clarify the concepts in light of which ecclesiastical power was to be understood.[83]

Another factor that explains Summenhart's position is his interpretation of jurisdictional power, which is very specific. As far as the etymological analysis of the term "jurisdiction" is concerned, Summenhart follows Gerson's writing in *De potestate ecclesiastica*.[84] According to Summenhart, the term "jurisdiction" is used as if it were drawn from *dictio iuris*, that is, the power of dictating law, or from *iurisditio*, that is, promulgation or pronunciation or notification or the power of promulgating the sentence or the law. Summenhart differs from Gerson, however, in that he takes the context in which the law or the sentence is dictated to be very specific. For Summenhart, jurisdictional power is connected to the actions of the court: jurisdictional power is "the power of having cognisance in a case and of dictating or proposing law (*ius*), that is, the sentence in that particular case, and promulgating this sentence."[85] In other words, jurisdictional power means exclusively the power to judge. This marks a clear difference from Gerson, and from medieval political theorists in general, who understood the power to dictate laws in a wider sense, including legislative and governmental power.[86]

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[83] For Gerson's theory of ecclesiastical power, see e.g., Posthumys Meyjes 1999, 247–313.

[84] Gerson noted that the term "jurisdiction" refers to the power of (dictating) *ius* (*iuris ditio*) or to the promulgation or pronunciation of *ius* (*iuris dictatio*). Gerson, *De potestate ecclesiastica*, consideratio 4, 230.

[85] *Opus septipartitum*, q. 2, sig. B4v: "Prima division est ista. Potestas ecclesiastica quedam est et dicitur potestas ordinis, quedam vero est et dicitur potestas iurisditionis, id est potestas cognoscendi in causa atque dicendi vel ferendi ius, id est sententiam in tali causa et illam promulgandi. Unde iurisdictio dicitur quasi dictio iuris, id est potestas dicendi ius. Vel iurisditio, id est promulgatio, vel pronunciatio, vel notificatio, vel potestas promulgandi sententiam seu ius."

[86] The term *iurisdictio* had its origin in Roman law. The original context of *iurisdictio* was in private law, in which *ius dicere* denoted the granting of a civil remedy in litigation. The magistrate had jurisdiction, that is, the power to say what law (*ius dicere*) was to be applied in the litigation. See Mousourakis 2003, 79–80; Johnston 2000, 628. However, during the evolution of Roman law the term *iurisdictio* was also applied in a broader context and related to public law. The lawyers of the late empire

While Summenhart's strict view of jurisdiction and the view of *potestas ecclesiastica* as *dominion evangelicum* fundamentally condition his commentary, he nevertheless shares some basic views of *potestas ecclesiastica* that were held by Gerson. Like Gerson and many other medieval theorists, Summenhart understands *potestas ecclesiastica* to speak of the church in a special sense. *Ecclesia* does not signify *congregatio fidelium*, "the congregation of men who are marked with the common mark of the faithful, which is the baptismal character."[87] Instead, *ecclesia* means "the congregation of those who are marked with a certain special mark—by which they are specially dedicated to worship of God—which mark is the character of office." Further, his view of the church in this sense is hierarchical; ordained ecclesiastical persons constitute a single hierarchy, "beginning from the lowest office or cleric all the way up to the supreme ordained who is the pope." Thereby, '*potestas ecclesiastica* is called the power conceded to the Church by Christ, that is, conceded to the ordained.'[88]

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could use the term *iurisdictio* to refer to the general powers to administer the justice possessed by the magistrate. Johnston 1997, 93–94. The interpretations of the medieval lawyers enforced this tendency a broader usage of *iurisdictio*. The difference between Summenhart and Gerson here demonstrates the extent to which "jurisdiction" was understood as a context-dependent term. Further, it could be seen as marking a difference between two literary genres. Gerson's *De potestate ecclesiastica* was a treatise on ecclesiastical power. Within this genre "jurisdiction" was understood in a broad sense, and the major interest was in governmental aspects of jurisdiction. Summenhart's *Opus septipartitum* represented the *De contractibus* literature and was characterized by moral casuistry in a juridically-defined framework. In this context it was judgment rather than legislation or administration that corresponded to the idea of jurisdiction as the power to dictate the law. For interpretations of "jurisdiction" in medieval legal thought, see Tierney 1982, 29–53; Bertolis 2005, 74–95.

[87] *Opus septipartitum*, q. 2, sig. B4r: "Hic igitur nota, exquo potestas ecclesiastica datur ab ecclesia, quod ecclesia capitur dupliciter. Uno modo pro congregatione quorumcumque hominum qui sunt insigniti signaculo communi ipsis fidelibus quod est caracter baptismalis, quo modo etiam laici nullum caracterem ordinalem habentes sunt de ecclesia, et per consequens dici possunt hoc modo persone ecclesiastice."

[88] *Opus septipartitum*, q. 2, sig. B4r: "Alio modo pro congregatione tamen illorum qui sunt insigniti quodam speciali signaculo, quo dedicati sunt specialiter ad dei cultum, quod signaculum est caracter ordinalis. Et hoc modo laici non sunt de ecclesia nec ecclesiastice persone dicendi, sed tamen ordinati aliquo ordine, incipiendo ab infimo ordine vel clerico usque ad supremum ordinatum qui est papa. Et hoc modo capitur hic quando potestas ecclesiastica dicitur potestas a Christo concessa ecclesie, id est concessa ordinatis." Summenhart's approach carries a certain individualist emphasis, albeit related to the office rather than to the person. It is symptomatic that he does not discuss ecclesiastical power as possessed by the church as a whole, which distinguishes him from Gerson.

In classifying ecclesiastical power, Summenhart adopts the structure used by Gerson, which had been developed in medieval canon law, and was already customary in the present context.[89] The basic division was between the power of order and jurisdictional power. This classification recognized that the sacramental power vested in the priestly order was distinct from a priest's administrative and judicial power.[90] The power of order was further divided into the power over *corpus Christi verum* and the power over *corpus Christi mysticum*. The former was thought to signify the sacramental power of consecrating the Eucharist as the true body of Christ. With the latter was generally understood the sacramental power over the congregation of believers as the mystical body of Christ.[91] Jurisdictional power had also two sub-species; a distinction was made between jurisdictional power in an internal forum and that in an external forum. This classification reflected the distinction between sin and crime and the corresponding distinction

[89] For Summenhart, the species of evangelical dominion are the same as the species of ecclesiastical power. *Opus septipartitum*, q. 2, sig. B4v: "Et si queratur. Primo que sunt species illius dominii evangelici. Respondetur quod ille eedem que sunt species potestatis ecclesiastice." In *De potestate ecclesiastica* Gerson had introduced the structure in *consideratio secunda*, consideratio 2, 228. Summenhart does make some additional distinctions. For example, he divides power into the power of the sacerdotal order and the power of the lower orders. *Opus septipartitum*, q. 2, sig. B4v: "Secunda divisio.Potestas ordinis est duplex, quedam est potestas ordinis sacerdotalis, quedam ordinis inferioris." This represents a significant difference from Gerson who took the power of order to be sacerdotal and sacramental by its very nature. For Jean Gerson, the power of order was essentially the power to consecrate the Eucharist and to administrate the sacraments. Summenhart also further divides the power of the lower order according to the classification of lower orders. He maintains that according to theologians there are six lower orders: deacons, subdeacons, acolytes, readers, exorcists, and doorkeepers, whereas lawyers recognize in addition the first tonsure and the psalmist (or cantor) as orders. *Opus septipartitum*, q. 2, sig. B4v.

[90] This distinction fueled the debate over the Pope's plenitude of power, for it enabled papal-minded theorists to argue that the bishops do not possess jurisdictional power by their ordination, but instead receive it from the pope. For the origin of this distinction, see e.g., Benson 1968, 45–55.

[91] Originally (in the Carolingian period), the term "mystical body" referred to the Eucharist, which was thereby distinguished from the true or earthly body of Christ. However, in the course of the development of Eucharist theology in the later Middle Ages, the term "true body of Christ" became to be associated with the Eucharist. After 1150 by "mystical body" was understood the church as "the organized body of Christian society united in the Sacrament of the Altar." Kantorowicz 1957, 196. Further, when the expression "mystical body of Christ" was used in a political context, it gradually lost its sacramental connotations and, by the fourteenth century, was taken to signify the church as a moral or political body. On this development, see Kantorowicz 1957, 194–206.

between the related courts of justice: the confessional (*forum internum*) and the ecclesiastical court (*forum externum*).[92]

Summenhart's own emphases define his view of the acts and actions that fall under these species of ecclesiastical power. Here, his view explicitly differs from Gerson.[93] An appropriate example is jurisdictional power in the external forum, which for Summenhart is a manifestation of the power to judge or "power to have cognizance in a case and to dictate or propose a sentence" in that case.[94] Summenhart identifies this power with the "power that was conceded to the Church directly by Christ to impose the spiritual punishment of excommunication or interdict on those who disobey the church."[95] With this

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[92] This distinction also reflected the conceptual separation of the positive legislation of the church (or canon law) from theological doctrines (or divine law). For the relevance of this distinction, see e.g., Trusen 1990; Mäkinen & Pihlajamäki 2004.

[93] The species for which Summenhart's commentary is most loyal to Gerson's text is the power of order over the true body of Christ. Summenhart follows Gerson in speaking of a habitude of the power of order and describes this habitude as the power "to consecrate the true body of Christ, and this was given to the apostles when the Savior said, as they were having dinner, 'This do in memory of me'." *Opus septipartitum*, q. 2, sig. B4v: "Quarta divisio. Potestas sacerdotalis est duplex, vel duplicem habet habitudinem, quedam est ad consecrandum corpus Christi verum, et illa fuit concessa apostolis in cena cum salvator dixit. Hoc facite in meam commemorationem." However, Summenhart also acknowledges the power of the lower orders in the consecration. He points out that, although the orders inferior to the sacerdotal order do not have the power to consecrate the true body of Christ, the power of the lower orders is nevertheless directed to the true body of Christ and is exercised in actions that assist or serve the sacerdotal power in the consecration of the true body of Christ. *Opus septipartitum*, q. 2, sig. B4v: "Et sicut illa potestas sacerdotalis est ad consecrandum corpus Christi verum, sic quelibet potestas ordinis inferioris ordine sacerdotali, ordinatur ad ipsam consecrationem veri corporis Christi, quia actus omnium inferiorum ordinum sunt actus quibus subministratur ei a quo consecratur verum corpus Christi. Unde et Johannes Gerson dividendo potestatem ordinis dividit eam immediate in potestatem super corpus christi verum, supple consecrandum, et in potestate super corpus Christi mysticum. Nec dividit prius potestatem ordinis in potestatem ordinis sacerdotalis et in potestatem ordinis inferioris. Nam utraque videtur esse potestas ad consecrandum verum corpus Christi aliquo modo, tamen prius posui illam divisionem, eo quod licet potestas ordinum inferiorum sit potestas exercendi actus ordinatos ad consecrationem corporis Christi veri, non tamen est potestas consecrandi corpus Christi."

[94] *Opus septipartitum*, q. 2, sig. B5r: "Quinta subdivisio. Ecclesiastica potestas iurisditionis est duplex. Quedam est ad cognoscendum in causa atque ad dicendum vel ferendum sententiam in tali causa in foro exteriori… Alia est ecclesiastica potestas iurisditionis ad cognoscendum in causa et ad diffiniendum vel ferendum sententiam in eadem in foro interiori."

[95] *Opus septipartitum*, q. 2, sig. B5r: "Quedam est ad cognoscendum in causa atque ad dicendum vel ferendum sententiam in tali causa in foro exteriori. Et illa est potestas a Christo immediate concessa ecclesie ad inferendum spiritualem penam excommunicationis vel interdicti in inobedientes ecclesie."

description or definition Summenhart adheres to Gerson's account in *De potestate ecclesiastica.* In *consideratio quarta* Gerson referred to Christ's dictates as follows: "If your brother sins against you, go and show him his fault, etc." (Matt. 18:15), and stressed that this concession was the foundation of the juridical power of excommunicating or interdicting those who were disobedient to the church and refused to hear its guidance.[96] The point to be noted is that, although Gerson took judicial power as the starting point for jurisdiction, he also included legislative and administrative powers in the ecclesiastical power of jurisdiction in the external forum.[97]

Unlike Gerson, Summenhart makes no reference to legislative or governmental powers as belonging to the jurisdictional power in the external forum. Instead, he stresses that jurisdictional power in the external forum is limited to the power of excommunicating or interdicting. He recognizes that the church or ecclesiastical persons also have power to impose other spiritual punishments, such as deposition, privation, or prohibition in regard to a benefice. He points out, however, that these have their immediate origin in canon law. Thereby, these powers are not ecclesiastical in the sense understood here. Further, he notes that ecclesiastical persons may have the power to impose corporeal punishment. Again, this is not an instance of ecclesiastical power, for this power is given to them by secular princes and not (directly) by Christ.[98] These final specifications tell how Summenhart

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[96] Gerson, *De potestate ecclesiastica*, consideratio 4, 231: "Hanc potestatem contulit Christus *Matth.* xviii, 15, dum dixit Petro vice omnium: *si peccaverit in te frater tuus, vade & corripe eum etc.* Sequitur, *quod si te non audierit, dic Ecclesiae, quod si Ecclesiam non audierit, sit tibi sicut ethnicus & publicanus.* Quo in loco, fundatur juridica potestas excommunicandi, vel interdicendi ab Ecclesiasticis Sacramentis, & communione fidelium rebelles & inobedientes Ecclesiae…"

[97] He explained, for example, that the above-mentioned concession of Christ was the foundation for the power to enact laws and canons and impose penalties according to church legislation. Further, he noted that spiritual jurisdiction is exercised according to canon laws. Gerson, *De potestate ecclesiastica*, consideratio 4, 231: "Fundatur etiam in hoc textu, nedum potestas excommunicandi, sed potestas definiendi, determinandi, statuendi, decernendi, constituendi Praecepta, Leges, & Canones…"

[98] *Opus septipartitum*, q. 2, sig. B5r: "Et dicitur notanter a Christo immediate concessa ecclesie, quia licet persone ecclesiastice etiam habeant potestatem ad inferendum aliquas penas spirituales alias a predictis, ut penam depositionis, privationis, inabilitationis ad beneficia, et sic de aliis, tamen potestatem talem non habent immediate a Christo et secundum legem evangelicam, sed secundum leges canonicas. Unde et talis potestas licet etiam ecclesiastica dicatur, eo quod non nisi persone ecclesiastice est concessa, tamen non est illa de qua hic loquimur, que a Christo immediate et secundum legem evangelicam est concessa."

analyzes ecclesiastical power in the context of the six-fold classification of dominion, in which ecclesiastical power as evangelical dominion is differentiated from dominions and powers that have their origin in canon or civil law.[99]

In applying his model of jurisdictional power in the *forum internum*, Summenhart redefines the demarcation between jurisdictional power and the power of order. This is partly due to the fact that in his source text, *De potestate ecclesiastica*, the power of order and jurisdictional power were not completely distinct spheres, but were related to each other. In *consideratio quinta*, Gerson defined this connection by saying that jurisdictional power "is founded on the sacerdotal and episcopal power of order."[100] The power of order over the mystical body of Christ, was understood, by Gerson to mean the priest's sacramental power over the congregation of believers. Under this power fell first the administration of the sacrament of the Eucharist and second, the administration or exhibition of the other sacraments.[101] However, Gerson also recognized that the context of administering the sacraments was conditioned by the church hierarchy: the relationship between the administrator, i.e., the priest or the bishop and the person who received the sacrament was a hierarchical one. This meant that the administration of a sacrament was not only a sacramental act, but also a hierarchical act. And for Gerson, hierarchical acts were manifestations of jurisdictional power. Consequently, Gerson placed the

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[99] Summenhart's target seems to be Gerson, who in *consideratio secunda* pointed out that jurisdictional power in the external forum can be understood in two ways. First, it can be taken to signify the power that was directly given by Christ according to evangelical law. Second, it can be taken in a broader sense that also includes the later additions of power originating from human law or donation made by secular emperors. Gerson, *De potestate ecclesiastica*, consideratio 2, 228: "Rursus potestas Jurisdictionis in Foro exteriori dupliciter consideratur. Uno modo prout immediate a Christo tradita est secundum legem Evangelicam, alio modo prout superaddita est ex humana constitutione, vel dono per Principes saeculares."

[100] Gerson, *De potestate ecclesiastica*, consideratio 5, 232: "Advertendum est itaque quod haec potestas Jurisdictionis quae radicaliter fundatur in potestate Ordinis Sacerdotalis & Episcopalis, dum in sua generalitate consideratur, respicit multipliciter corpus Christi mysticum…"

[101] Gerson, *De potestate ecclesiastica*, consideratio 2, 228: "Rursus potestas Ordinis duplicem habet respectum. Unus est super Corpus Christi verum quoad consecrationem ejus: alter est super Corpus Christi mysticum, seu membra ejus. Et hoc dupliciter; vel quoad ministrationem Corporis Christi veri; vel quoad ministrationem, vel exhibitionem alterius Sacramenti, sicut est Ordo vel Confirmatio vel poenitentialis Absolutio."

administration of the sacraments under jurisdictional power as well as under the power of order.[102]

Summenhart does not accept this model of jurisdiction. He stresses that jurisdictional power is "formally to propose a sentence, or at least, prefatorily, to acquire cognizance over the case." From this perspective Gerson's view seems erroneous, because "to preach, confirm, ordinate, administer the Eucharist and to baptize is not to propose a sentence over the one to whom it is preached and who is confirmed or baptized and so on."[103] Summenhart's solution as the commentator on Gerson's text is to accept these hierarchical acts under the power of order, or more precisely put, to identify the sacerdotal power of order over *corpus Christi mysticum* with the power of exercising these acts.[104] Thus, Summenhart abandons the careful distinction between sacramental

[102] Gerson's model for conceptualizing churchly jurisdiction came from Dionysian language. According to Gerson, jurisdictional power was exercised in three hierarchical acts: the acts of illuminating, perfecting, and purifying. The acts of purifying the congregation of believers took place both in the external as well as the internal forum, whereas the acts of illuminating and perfecting the church were exercised solely within the internal forum. In Gerson's view, purifying was done by inflicting the punishments of excommunication or interdict (in the external forum) and by administering the sacraments of baptism and absolution (in the internal forum). The illuminating was done by preaching and teaching the Christian doctrine. The perfecting was done by administering the other sacraments. Gerson, *De potestate ecclesiastica*, consideratio 5, 233: "…quod est fidelium Ecclesia, quos fideles oportet secundum tres actus hierarchicos regere, qui sunt secundum Dionysium purgare, illuminare & perficere. Purgare per inflictionem poenalem Excommunicationis vel Interdicti, si rebelles inveniantur, quod spectat ad Jurisdictionem coercitivam, de qua praedictum est, quamvis et hec purgatio fiat per Baptismum & Sacramentalem Absolutionem, non tamen coercitive. Oportet insuper illuminare per praedicationem & doctrinam. Oportet demum perficere per aliorum Sacramentorum ministrationem." For Gerson's usage of Dionysian language, see e.g., Pascoe 1973, 17–48.

[103] *Opus septipartitum*, q. 2, sig. B6r: "Et nota quod cancellarius parisiensis ubi supra videtur minus proprie loqui consideratione quinta, quando potestatem ordinis super mysticum corpus in illuminando per doctrinam predicationis et perficiendo per illa tria sacramenta, scilicet per eucharistiam, confirmationem et ordinem, et purgando per baptismum vocat potestatem iurisditionis. Quod probatur quia nulla potestas debet dici iurisditionis nisi sit potestas ad ferendum sententiam aliquam, ita quod exercere potestatem talem sit formaliter ferre sententiam, vel saltem praeambulariter cognoscere super causam. Modo exercere predictam potestatem, id est predicare, confirmare, ordinare, ministrare eucharistiam et baptisare, non est ferre sententiam in eo cui predicatur, et qui confirmatur et ordinatur, et sic de aliis."

[104] *Opus septipartitum*, q. 2, sig. B4v: "Alia est potestas sacerdotalis ad exercendum tres actus hierarchicos circa congregationem fidelium qui sunt. Primo ipsam illuminare supple per doctrinam predicationis. Secundo ipsam perficere per ministrationem istorum trium sacramentorum scilicet eucharistie, confirmationis, et ordinis. Tertio eandem purgare per ministrationem sacramenti baptismi purgantis a culpa et pena."

acts and hierarchical acts, which separated the power of order from the jurisdictional power in Gerson's theory.

Although Summenhart does not accept Gerson's concept of jurisdiction, he does agree with Gerson on one point. Both writers placed the administration of the sacrament of absolution under the power of order as well as under jurisdictional power. As Summenhart explains:

> But among the sacraments only the sacrament of absolution is such that the minister proposes a sentence in administering it. From which it follows that a certain power is simultaneously counted as a power of order and of jurisdiction, namely, the power of absolving, whereas a certain other is a power of order such as is the power of consecrating the Eucharist and conferring it, the power of baptizing and of ordination. For in administering these, the minister does not dictate a sentence to the person to whom he administers the sacrament.[105]

In the internal forum, Summenhart identifies jurisdictional power with the power that is exercised by the priest in administering the sacrament of absolution or penance.[106] Thus, in general, Summenhart

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[105] *Opus septipartitum*, q. 2, sig. B5r: "Modo inter sacramenta solum sacramentum absolutionis est illud in cuius ministratione ministrans fert sententiam. Ex quo sequitur quod aliqua potestas simul est ordinis ac iurisditionis censenda scilicet potestas absoluendi, aliqua vero tamen est ordinis ut potestas consecrandi eucharistiam et conferendi eandem, potestas baptisandi et ordinandi. Nam in illorum ministratione ministrans non dicit sententiam aliquam in illum cui ministrat."

[106] Summenhart classifies this power further by presenting three additional divisions, which embody the scholastic conceptions associated with the sacrament of penance or absolution. It is apparent that Summenhart's interest lies simply in structuring or classifying, not in making any contribution to theological discourse. First, he takes up the metaphor of the power of the keys of heaven. According to him, the priest's power to absolve is elsewhere called the power of keys, "from the promise that the Lord made to Peter in Matthew 18": "I will give you the keys of heaven." *Opus septipartitum*, q. 2, sig. B5r. Interestingly, on this point Summenhart's use of biblical references is careless, for Matthew 18 does not correspond to either of the passages he quotes, which are from Matthew 16:19 and John 20:23. Yet Matthew 18:18 repeats Christ's concession, but this time the power of the keys is given to all the apostles and not to Peter alone. This twofold concession of the "power of binding and loosing" fed the debate between conciliarists and papalists. See e.g., Tierney 1972, 154–164. Summenhart does not, however, show any cognizance of this issue. In medieval political ecclesiology, this metaphor had also been employed in a broader sense, associated with ecclesiastical jurisdiction in general. For the origin of this interpretation, see Tierney 1955, 30–33. Summenhart's narrow usage is in line with theological tradition dating from the patristic period. For scholastic theories concerning the power of the keys, see Hödl 1960. Summenhart then divides the keys of heaven into the key of knowledge and the key of power. *Opus septipartitum*, q. 2, sig. B5v. Finally, Summenhart divides the key of power according to the distinction that could be made between the priest's sacramental activity in absolution (the power of "proposing a sentence of absolution from guilt, and partly from punishment") and the priest's extra-sacramental activity in bestowing

agrees with Gerson that jurisdictional power (in the internal forum) is based on the power of order. Yet, unlike Gerson, he does not believe that the totality of the power of order over *corpus Christi mysticum* can be viewed as jurisdictional power.

Summenhart's model of ecclesiastical power as evangelical dominion leads him to criticize Gerson in several details.[107] The most explicit criticism is related to Gerson's account of subjection. The target of Summenhart's criticism is a paragraph in *consideratio secunda* of *De potestate ecclesiastica* in which Gerson clarified how the administration of sacraments was affected by its hierarchical context. He wrote that the power of jurisdiction (in the internal forum) arises from two different and distinct kinds of subjection. The first is the voluntary subjection of the person who makes himself subject to the minister (as a penitent subjects himself to a priest, or a priest to a bishop). The second kind of subjection arises from the official authority of the superior and is compulsory and involuntary in nature in the sense that the will of the subjected person has no effect on this relation of subjection.[108] Having presented this model, Gerson went further and stated

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indulgences on a penitent (power of 'proposing a sentence of absolution from the very punishment'). *Opus septipartitum*, q. 2, sig. B6r. This division was standard within the doctrine on the indulgences during Summenhart's time. The sacramental activity exercised by the priest in celebrating the sacrament of penance removes the guilt of sin, but not all of its consequences. The absolution from the temporal punishment that, according to divine law is due to sin, takes place through extra-sacramental remission in the form of indulgences. On indulgences in the late medieval period, see Felmberg 1998, 11–71; Shaffern 2006.

[107] For example, motivated by his view of dominion, Summenhart criticizes Gerson's designation of baptism as the foundation of ecclesiastical power. Gerson's point was to oppose the concept that the foundation of ecclesiastical power resided in the infused divine charity or gratifying grace. Gerson, *De potestate ecclesiastica*, consideratio 1, 227. Although Summenhart openly endorses Gerson's anti-Donatist emphasis, he stresses that "the character of order, sometimes even added with election or confirmation, is the proximate foundation and title of ecclesiastical power, which is called evangelical dominion, and therefore sufficient." According to him, baptism could be called a remote and insufficient foundation for ecclesiastical power, for "the character of order presupposes baptism." *Opus septipartitum*, q.2, sig. B4r. Another example is Summenhart's treatment of Gerson's description of ecclesiastical power. At the beginning of his *consideratio prima*, Gerson characterized ecclesiastical power by a careful definition, which he then utilized throughout the treatise. See Gerson, *De potestate ecclesiastica*, consideratio 1, 227. Summenhart, who classifies dominion and not power, does not accept Gerson's definition as the point of departure, and he quotes Gerson's definition only at the end of his commentary on *consideratio prima*. See *Opus septipartitum*, q. 2, sig. B4v.

[108] Gerson, *De potestate ecclesiastica*, consideratio 2, 228: "Potestas Jurisdictionis in Foro interiori consurgit ex duplici radice. Uno modo ex parte hominis ultro se

that the ministration of the sacraments (except baptism) presupposes that the person who receives the sacrament is also subject to the minister of the sacrament. He maintained that voluntary subjection is sufficient for the validity of the sacraments of confirmation and order, although the regular administration of these sacraments presupposes that the subjection in question arises from the official superiority of the administrator.[109] According to Gerson, the criteria for the sacrament of penance are stricter in the sense that even the validity of the sacrament of penance, as its regular administration, presupposes both voluntary and official subjection. This was because the matter of the sacrament of penance is the subject who is in sin. In the absence of subjection, there is no subject, which means that the material of this sacrament is absent, and consequently, absolution does not take place.[110]

In his commentary, Summenhart explicitly rejects Gerson's view of the two kinds of subjection.[111] He points out that "if some jurisdictional power originates from either of these subjections mentioned above, such a jurisdictional power should not be called ecclesiastical power in the sense meant here, but would instead be human" jurisdictional power. Only the kind of power that has its origin in the collation of

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subjicientis tali potestati, sicut confitens subjicit se sponte Presbytero, & ordinandus Episcopo: alius subjectionis modus consurgit ex autoritate Superioris, hunc vel illum tali vel tali subjicientis; quod fieri potest, non ad arbitrium illius qui subjicitur, & sic inter duplicem hanc subjectionem differentia magna patet."

[109] If this requirement of official superiority is not met, then the administrator of the sacrament is guilty of violating the regulations of the Church and commits a sin, although the sacrament (of order or confirmation) is valid as a sacrament.

[110] Gerson, *De potestate ecclesiastica*, consideratio 5, 233: "Secus est in ministratione Sacramentorum, ubi requiritur quod persona cui sit ministratio, sit ministranti subdita, praeterquam in Baptismo quod est necessitatis Sacramentum non iterabile. Similiter in Sacramento Confirmationis et Ordinis, quibus indelebilis character imprimitur: inde sufficit, de necessitate Sacramenti, non tamen Praecepti, subjectio voluntaria suscipientis haec Sacramenta ab illo qui conferre potest illa; peccant tamen dans atque suscipiens, si non adsit subjectio per Superiorem ordinata. Secus autem est in Poenitentiae Sacramento, ubi de necessitate Sacramenti et Praecepti requiritur praedicta duplex subjectio, juxta communiorem Doctorum sententiam; sic quod aliter non datur Absolutio, etiam si dari tentetur, quia materia deficit, quae est peccator subditus. Subditus, inquam, nedum voluntaria subjectione, sed aliena Superioris autoritate."

[111] *Opus septipartitum*, q. 2, sig. B6r: "Unde et non bene videtur dictum per eundem quod potestas iurisditionis in foro interiori (si saltem loquimur de ea que est species ecclesiastice potestatis immediate a Christo instituta) consurgat ex duplice radice. Uno modo ex parte hominis ultro se subiicientis tali potestati, sicut cum sponte confitens subiicit se presbytero et ordinandus episcopo. Alius subiectionis modus consurgit ex auctoritate superioris, hunc vel illum tali vel tali subiicientis quod fieri potest non ad arbitrium illius qui subiicitur, hec ille."

order deserves the title of ecclesiastical power.[112] These remarks aptly convey Summenhart's model of ecclesiastical power as evangelical dominion. He thinks of subjection in terms of dominion and sees subjection and dominion as corresponding relations. From this viewpoint he maintains that, if the subjection has a human origin, the dominion also has a human origin. If this were the case, then ecclesiastical power could not be understood as equivalent to evangelical dominion.

Although Summenhart rejected Gerson's model of subjection, he did not overlook the question that Gerson's model was meant to answer: How does the hierarchical framework condition the exercise of sacramental power and affect the validity of the sacraments?[113] Summenhart bases his answer to this question on the relation correlative to subjection, that is, dominion. He frames his discussion with an example derived from the juridical reality of the church: before the priest is instituted or elected into his parish, it is illicit for him to administer sacraments in that parish, and further, the administration of the sacrament of absolution would even be void. This is true despite the fact that by ordination into the priesthood, jurisdictional power *in foro interiori* is conferred upon the person as is also the power of order over the *corpus Christi mysticum*.[114] Why is this so? Summenhart's explanation is

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[112] Summenhart admits, though, that when it comes to the exercise of this power, it could be suspended or restricted by human constitution, which, conversely, can also release the parish from the subjection. *Opus septipartitum*, q. 2, sig. B6r: "Nam si qua potestas iurisditionis innascitur illi cui sit alique predictarum subiectionum, non tamen dicetur talis potestas iurisditionis species potestatis ecclesiastice in proposito capte, sed erit humana, illa vero quam habet ex ordinis collatione cum dicitur. Quorum remisiteris etc. erit vere species potestatis ecclesiastice in proposito nostro, licet illa quo ad exercitium possit esse suspensa vel restricta per humanam constitutionem que econtra etiam solui et ampliari potest plebem ampliorem sibi subiiciendo."

[113] In Gerson's view, the consecration of *corpus Christi verum* differs from all other sacramental acts as far as subjection is concerned. As the priest's power is over the bread and wine, which are inanimate things, the subjection is defined in terms of ownership or dominion. From this viewpoint Gerson suggested that subjection does not affect the validity of the sacrament; it makes no difference whether the priest uses his own bread and wine or whether they belong to another person. Gerson, *De potestate ecclesiastica*, consideratio 5, 233: "Porro talis ministratio Sacramentorum non habet pro materia debita res solum insensibiles, prout est in consecratione Corporis Christi, ubi pro materia debita requiritur & sufficit panis triticeus & vinum: nec refert quoad consecrationis necessitatem, si panis sit ipsius consecrantis vel alterius."

[114] *Opus septipartitum*, q. 2, sig. B6r: "Et si queras secundo. Si in collatione ordinis sacerdotalis confertur sacerdoti nondum habenti plebem potestas iurisditionis in foro interiori atque potestas ordinis super mysticum Christi corpus ipsum illuminandi perficiendi atque purgandi, modo dicto super, quid ergo novi sibi confertur, cum talis sacerdos sine omni plebe subiecta prius ordinatus post ordinationem eligitur vel

based on the distinction between two kinds of dominions: evangelical and canonical dominion.[115] He notes that when the priest is instituted into a parish, that parish becomes subject to him, and this subjection has a corresponding dominion possessed by the priest.[116] Further, this dominion is not an evangelical (ecclesiastical) dominion, but a canonical (ecclesiastical) dominion, that is, dominion that is conceded to the priest by canon law.[117] Summenhart stresses the significance

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instituitur in plebanum alicuius plebis de novo. Quod enim aliquid novi sibi conferatur, probatur, quia ante eius electionem vel institutionem in plebanum ministratio sacramentorum (si qua illi plebi ministrasset) fuisset sibi illicita, nunc autem est licita, immo ministratio sacramenti absolutionis quam plebi ex voluntate se subiicienti impendissent non solum illicita sed etiam nulla fuisset. Hoc autem non esset si nihil novi iuris collatum sibi fuisset."

[115] Summenhart also suggests another solution according in which the priest does not receive any new right or dominion by his election to the parish. Instead, before his institution to a parish, the priest is proscribed by canon law from exercising his evangelical dominion over the parish. With his institution, this canonical ban is then removed or relaxed. However, what contradicts this solution, according to Summenhart, is that the evangelical dominion is not sufficient for the valid administration of the sacrament of absolution. Following Gerson, he notes that without the parish, the priest is without the necessary matter of the sacrament of absolution, and therefore, nothing would be performed. If evangelical dominion were sufficient, the priest who is without a parish should be able to absolve a penitent in a valid way, although inso doing he would be acting against canon law. In other words, Summenhart's point is that legal prohibition causes *de iure* inability, but not *de facto* inability. And here it is question of *de facto* inability to absolve the penitent. Therefore, the removal of the canonical ban is not sufficient; what is required is a new power or dominion. *Opus septipartitum*, q. 2, sig. B6v.

[116] *Opus septipartitum*, q. 2, sig. B6v: "Quod autem illud novum sit dominium quoddam dicendum, probatur. Nam tali de novo plebs est subiecta, sed nove subiectioni correspondet nova superioritas et dominium, igitur etc. Quod autem illud dominium non sit evangelicum dicendum probatur, quia dominium evangelicum alicui collatum est inauferibile, illud autem est sibi auferibile, cum sit spoliabilis plebe."

[117] To prove his point Summenhart refers to an example from the juridical reality of the church. He notes that a person can possess dominion over the parish, even though he does not possess evangelical dominion, as is the case when a person has been elected and instituted into a parish and only after his election is ordained into priesthood, within the legitimate period of time. According to Summenhart, this juridical fact (i.e., that one dominion can exist without the other) is a sign that proves that the (canonical) dominion over the parish and evangelical dominion are really distinct. *Opus septipartitum*, q. 2, sig. B6v: "Ad istam questiunculam dicendum, quod et si utrumque videretur posse dici, primum tamen plus placet scilicet quod sibi novum dominium conferatur, sed illud licet ecclesiasticum dici posset non tamen ecclesiasticum evangelicum, sed ecclesiasticum canonicum, scilicet canonicis legibus sibi concessum. Ratio autem cur primum plus placeat quam secundum, est, nam etiam nondum ordinatus in sacerdotem si eligitur in plebanum ac instituitur, habet quandam superioritatem et dominium in plebem suam, et non evangelicum, cum nondum sit ordinatus in sacerdotem, licet infra legitimum tempus debeat ordinari ordine sacro, igitur signum est quod illud dominium quod per electionem sibi collatum est, est aliud realiter a

of canonical dominion in exercising evangelical dominion. Without canonical dominion the priest cannot administer the sacraments licitly, or give a valid sacrament of absolution. To explain why the absence of canonical dominion impedes true or valid administration of the sacrament of absolution, but not of other sacraments, Summenhart notes that only the administration of the sacrament of absolution is formally to pronounce a sentence.[118] By referring to canon law (*Liber extra* 5.38.4 and 5.38.12), he stresses that the sentence pronounced by a person who is not one's judge or a sentence that is pronounced on those who are not subject to this person is null.[119]

Although Summenhart thinks of the hierarchical underpinnings of sacramental activity in much the same way (although in different terms) as Gerson, he makes a statement that does not have any parallel in Gerson's text. Summenhart emphasizes the distinction between the efficacy and the validity of the sacraments in a special way. He treats the absence of canonical dominion as an obstacle to grace by suggesting that in the absence of canonical dominion, the sacraments are not fully effective.[120] In this respect all the sacraments discussed are

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dominio evangelico." Here Summenhart is applying the Aristotelian principle concerning the real distinction between two entities. See Aristotle, *Topics*, 7, 2, p. 256 (152b34–152b35).

[118] *Opus septipartitum*, q. 2, sig. B6v: "Et si tertio queras, dicens. Si ergo prius ordinatus in sacerdotem sine plebe, et postea electus in plebanum et institutus, acquirit novum dominium, ratione cuius erit sibi licita ministratio sacramentorum, que ergo ratio diversitatis quod carentia illius dominii canonici non impedivisset quin si sacramentum baptismi et eucharistie contulisset illi plebi, vere ea contulisset quamvis peccasset conferendo. Et idem est de episcopo non habente plebem, qui si conferat alicui ordinem et confirmationem, vere erit confirmatus et ordinatus et tamen illa carentia dominii canonici impedivisset quod si illi plebi contulisset sacramentum absolutionis, non vere illud contulisset, quia hi non vere fuissent absoluti."

[119] *Opus septipartitum*, q. 2, sig. B6v: "Respondetur. Ratio diversitatis est ista, quia solum sacramentum absolutionis est tale quod eius ministratio formaliter est latio sententie. Modo sententia lata a non suo iudice vel in non subditum, est nulla, ut in c. quod autem, de peni. et remis. et eodem ti. c. omnis. Sed aliorum sacramentorum ministratio non est formaliter latio sententie, quia eucharistiam alicui conferre vel ordinem vel huiusmodi non est sententiam dare…" Summenhart also says that if a priest is by his superior given the power to preach in a parish and administer the sacraments of baptism and the Eucharist, but not the sacrament of absolution, it should not be said that this institution brought him jurisdictional power, nor even canonical jurisdictional power, although it can be said that he was given a certain canonical power or canonical dominion. But simply giving the priest power to administer the sacrament of absolution, the superior gives him jurisdictional power. *Opus septipartitum*, q. 2, sig. B7r.

[120] Summenhart's point does not seem to have any connection to the traditional distinction between the efficacy of the sacraments *ex opere operantis* and *ex opere operato*. For this distinction, see e.g., McGrath 2001, 515.

equal: there is no difference between the sacraments of absolution, the Eucharist, confirmation, or order. According to Summenhart, when a priest is not the legitimate judge of the person who receives the absolution, the absolution does not have any effect, that is, the removal of guilt. Similarly, when the Eucharist, or the confirmation or order, is administered by the priest who is not the superior of the recipient of the sacrament, the sacrament does not deliver divine grace to the recipient, eventhough the sacrament itself is valid. Summenhart does not give reasons or seek textual support for this view. In any case, it is apparent that he is inclined to emphasize official hierarchy and its role in sacramental activity in a way that goes beyond Gerson's inclinations.[121]

Summenhart's definition of evangelical dominion

After a lengthy excursion into ecclesiastical power, Summenhart returns to his main discussion. He characterizes evangelical dominion with his own definition, which compares it to the other species of dominion. Accordingly, evangelical dominion:

> …is dominion, directly from God alone, appropriate to someone according to pure or proper evangelical law, and according to that only, by reason of the character pressed upon him authoritatively by God alone, and not alienable when the character is preserved.[122]

The assimilation of evangelical dominion into ecclesiastical power is highlighted by the foundation of evangelical dominion, which is the character of order. Also the specification concerning the law embodies this conception. As described earlier, Summenhart ended up with the

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[121] *Opus septipartitum*, q. 2, sig. B7r: "Attamen in hoc est simile quod sicut absolutio non habet suum effectum, scilicet deletionem culpe in recipiente eam, eo quod ponit obicem recipiendo eam contra prohibitionem ecclesiae a non suo iudice, et pro tanto dicitur non vere impendisse sacramentum absolutionis. Sic etiam eucharistia in recipiente eam a non suo superiore, etiam non habet effectum cum ponat obicem, licet eucharistia in se sit verum sacramentum. Idem de confirmatione et ordine, quia illa non tenent in non subdito quo ad illum effectum qui est gratia, licet teneat quo ad effectum qui est caracter impressus, sic forte ponentes absolutionem pro uno effectu habere ornatum, dicerent predicta in absolutionem impresisse ornatum, licet non contulisse gratiam." Summenhart's view that the absence of canonical dominion as an obstacle to grace is striking and exceptional. I have not been able to find any parallels among his contemporaries.

[122] *Opus septipartitum*, q. 2, sig. B7r: "Est dominium immediate a solo deo conveniens alicui secundum legem pure vel proprie evangelicam, et secundum solam illam ratione caracteris sibi immediate a solo deo auctoritative impressi, et inabdicabile, servato caractere."

qualification "according to pure or proper evangelical law and according to that alone" in the process of identifying evangelical dominion. Despite its complexity, the rationale for this specification is simple: "evangelical dominion" signifies dominion, which is conceded exclusively by evangelical law. Summenhart uses an example to clarify his meanings:

> Example: the right or dominion which the preaching apostles had for accepting temporal stipends from those people to whom they preached is not properly called evangelical [dominion], because that right was appropriate to them according to natural law, which concedes this right to those who sow spiritual seeds. Thus, when Christ was giving this law, in Matthew X and Luke XI, he mingled natural law with his evangelical law.[123]

Summenhart does not explicitly state (here or elsewhere) exactly what he means by "evangelical law." Yet the general implication is that evangelical law was dictated by Christ and is documented in the Gospels. Summenhart's point is that not every power that can be justified by referring to Christ's authoritative endowments in the Gospels is properly called evangelical dominion. This is because not everything that Christ dictated as law qualifies as evangelical law; sometimes Christ's authoritative endowments consisted of a mixture of evangelical law and natural law. According to Summenhart, only dominion that is exclusively of evangelical law deserves to be called evangelical dominion.

Summenhart's explanation of his definition is affected by a feature that is related to the general nature of the definition itself, namely, the species of dominion is described from a viewpoint that is individualistic in a relevant way. At its center is the idea that dominion is appropriate to some individual person. Up until now this individualistic undertone has remained in the background, but in the case of evangelical dominion it comes out with emphasis. This is because, as explained earlier, Summenhart understands evangelical dominion as official dominion: it is dominion vested in the officials of the church. This combination of official nature of the evangelical dominion and the individualistic nature of its definition creates a tension that leads Summenhart to recognize two levels of discussion.

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[123] *Opus septipartitum*, q. 2, sig. B7r: "Exemplum, ius vel dominium quod apostoli predicantes habuerunt ad accipiendum stipendia temporalia ab his quibus predicabant non est proprie evangelicum dicendum quia illud ius competit eis secundum legem naturalem, que hoc ius concedit seminantibus spiritualia, unde Christus eam legem ferendo Mattheus X et Lucas XI, miscuit legem naturalem sue legi evangelice."

These two levels become explicit when Summenhart gives the first characteristic as "directly from God alone."

> It is first said "directly from God alone," because [evangelical dominion] is instituted by Christ alone, and by him alone it is conferred on whom it is conferred, as its foundation, namely, the character is by God alone, when we are speaking of the authoritative collation, although the one who confers the order officially confers the character and the dominion that is founded on that.[124]

With the distinction between authoritative the ministerial collation, Summenhart recognizes that, from the viewpoint of the individual, evangelical dominion seems to have a two-fold origin. On the one hand, it is "directly from God alone." No other authority—not even the whole university of men—could establish or destroy ecclesiastical power, as Summenhart emphasizes in a later passage.[125] On the other hand, however, the ecclesiastical person receives evangelical dominion from the church. It is the bishop who, through his office, confers the character and the dominion that is founded on that character.

Summenhart develops his view further in a later section. He points out that the description "directly from God" does not signify that the ecclesiastical persons receive their evangelical dominion directly and personally from God. He elaborates further by making use of a distinction that is taken from Gerson's *De potestate ecclesiastica*. Summenhart says that we can discuss the ecclesiastical power in two senses or from two different viewpoints: we can speak of it in the formal or absolute sense (*formaliter ac absolute sine respectu*) or in the material sense, in proportion to its historical manifestations (*materialiter seu respective*). In the absolute sense we may conclude, according to him, that ecclesiastical power is "directly from God the Christ." No other authority could establish or destroy ecclesiastical power. In the material sense, that is, when ecclesiastical power is understood as "attributed to this or that person by a legitimate law," the conclusion is different. Summenhart

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[124] *Opus septipartitum*, q. 2, sig. B7r: "Dicitur primo a solo deo immediate conveniens, quia est a christo solo institutum et ab ipso solo confertur immediate ei cui confertur, sicut et eius fundamentum scilicet caracter a solo deo confertur ei cui confertur loquendo de collatione auctoritativa, licet conferens ordinem conferat ministerialiter caracterem et dominium in eo fundatum."

[125] *Opus septipartitum*, q. 2, sig. B7r. See note 126 below. In medieval political language the term university (*universitas*) implied government. When a group of individuals became a university, the group came into possession of the jurisdiction or power to create a ruling official. Tierney 1982, 36–37.

maintains that initially ecclesiastical power was conceded to Peter and other apostles directly from God, but ever since it has been conceded to ecclesiastical persons "through other men who have elected or consecrated these persons or instituted them in some other way."[126]

Summenhart applies the same distinction when explaining how the inalienability of evangelical dominion should be understood. His basic view is that evangelical dominion is inalienable, even at the personal level of speaking. According to him, the ordained person essentially retains his power over the subjects as long as he retains the character of order.[127] Yet, when his discussion confronts the juridical realities of the church, he admits that the issue is not entirely simple. As is often the case, Summenhart develops his view with the aid of a counter-argument. The argument claims that "the ecclesiastical power of jurisdiction in the external forum is alienable when the character is retained." The claim is proven with a reference to jurisdictional power as possessed by a bishop. The person who has been elected and confirmed as a bishop has acquired the ecclesiastical power of jurisdiction through his confirmation, even before his consecration has taken place. From this juridical fact, it can be concluded that jurisdictional power in the external forum is not founded on any irremovable order,

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[126] *Opus septipartitum*, q. 2, sig. B7r: "Dicendum quod potestas ecclesiastica consideratur dupliciter quantum ad propositum nostrum sufficit. Primo in se formaliter ac absolute sine respectu, et hoc modo fuit et est immediate a deo Christo, sic quod a nullo altero fuit instituta, nec congregatio totius universitatis hominum (secluso Christo) potuisset sibi talem potestatem instituere, sicut tamen potuit vel posset instituere potestatem imperialem super omnes, et potestatem regalem, potestatem quom ducatuum, comitatuum, baroniarum, et ita de reliquis potestatibus pure secularibus, non autem potuisset sibi instituere sacerdotium… Nec posset similiter destituere sicut nec mutare legem Christi, que tamen legis mutatio sequeretur ad mutationem sacerdotii… Alio modo consideratur potestas ecclesiastica materialiter seu respective prout applicatur ad hanc vel illam personam iure legitimo, et hoc modo in principio nascentis ecclesie collata est immediate a deo tam Petro quam aliis apostolis…sed quo ad successores apostolorum et discipulorum Christi habentes potestatem ecclesiasticam verum est quod illorum potestas ecclesiastica eis collata est non immediate a Christo, sed mediate per homines eos eligentes vel consecrantes, vel aliter instituentes." Summenhart uses Gerson's writing selectively, as he implies at the beginning of this quotation. In Gerson's text the two distinct ways of speaking of ecclesiastical power were accompanied by a third: ecclesiastical power in regard to its use. See Gerson, *De potestate ecclesiastica*, consideratio 6, 234; Ibid., consideratio 9, 238. For Summenhart's application of this principle, see below pp. 146–148.

[127] *Opus septipartitum*, q. 2, sig. B7v: "Dicitur sexto inabdicabile, quia quam diu ordinatus retinet caracterem, tam diu retinet predictam potestatem in subiectos adeo quod per depositionem et degradationem non aufet sibi illa potestas in essentia, licet aliquando non retineat eam quo ad licitum usum…"

but has its proximate foundation in the election and confirmation, which can be stopped or annulled. Therefore, if a bishop should be deposed or degraded from his office, or should he renounce his episcopacy himself, then he will lose his ecclesiastical power of jurisdiction in the external forum. Here, the argument relies explicitly on the juridical principle: A thing is dissolved by the same causes through which it arises.[128]

In his reply to this argument, Summenhart admits that the power mentioned above can be essentially lost when power is considered in a material or respective sense. By this power Summenhart means the ecclesiastical power of jurisdiction in the external forum as possessed by particular individuals in the church. In this sense this power is variable and mutable in nature.[129] At the same time Summenhart points out that in the absolute sense, ecclesiastical power of jurisdiction in the external forum is not alienable from the church, because this power remains as long as the church remains. Further, he suggests that if we think of this power (in the respective sense) as it was possessed by the apostles, it was perhaps inalienable in them. This is because the apostles did not receive this power through human election or confirmation,

[128] *Opus septipartitum*, q. 2, sig. C1r: "Tertio arguitur contra ultimam clausulam descriptionis. Potestas ecclesiastica iurisditionis in foro exteriori est abdicabilis, servato caractere, igitur, probatur, quia electus et confirmatus in episcopum per confirmationem acquirit potestatem predictam etiam ante consecrationem in episcopum, ponamus igitur quod deponatur vel degradetur, iam non solum amittet potestatem illius iurisditionis quo ad usum, ut sibi non liceat aliquem excommunicare, vel quo ad hoc quod aliquid faciat excommunicando, sed etiam essentialiter amittet eam, probatur, quia illa non fuit fundata precise super caractere sacerdotali vel alterius ordinis inauferibilis, sicut potestas ordinis vel potestas iurisditionis in foro interiori sed super electione et confirmatione tanquam super fundamento proximo. Modo confirmatio illa potest cassari et annullari, et per consequens omnino auferetur etiam in essentia illa potestas ab episcopo remanentibus aliis potestatibus. Et idem fieret si ipsemet renunciet episcopatui, sicut enim per eius consensum in electionem et confirmationem acquisivit illam potestatem, ita per eius resignationem videtur abdicare. Confirmatur, nam sicut potestas iurisditionis in foro exteriori attributa episcopo per canonicas leges et concessiones, scilicet potestas aliquem deponendi, degradandi et privandi, et potest auferri etiam essentialiter, ita etiam illa que est ad excommunicandum, probatur, quia utraque est sibi acquisita humana via. Res autem per quas causas nascitur, per easdem dissoluitur." For this principle in canon law, see *Liber extra*, 5.41.1.

[129] On this point Summenhart follows Gerson closely. Yet it should be noted that, for Gerson, this description was essentially an invitation to discuss the Pope's ecclesiastical power as a variable and removable power. Summenhart makes no reference to the Pope's power here. See Gerson, *De potestate ecclesiastica*, consideratio 8, 236.

but rather through divine institution. Thereby, they could have lost it only through divine destitution.[130]

In discussing the foundation of evangelical dominion, Summenhart clarifies the role of the church as the administrator of evangelical dominion or ecclesiastical power. Summenhart's basic view is that the foundation of evangelical dominion is the character of the order that is pressed upon the ecclesiastical person directly by God.[131] Yet he recognizes that the church has some liberty of action within this basic position. In defending his view, Summenhart refutes the suggestion that a holder of the first tonsure could possess jurisdictional ecclesiastical power owing to an ecclesiastical benefice of *beneficium curatum simplex*.[132] However, he continues the discussion of the issue and formulates an additional question of a more principle nature: Could it be possible that the pope, by his plenitude of power, cannot concede the ecclesiastical power of jurisdiction to the tonsured? Summenhart is ready to recognize the weight of evidence of this example, suggesting that the pope could make this kind of concession. Yet in order to justify this view, Summenhart clarifies his position and refers to the church as a whole and not to the Pope alone. With apparent conciliarist emphasis, Summenhart states that "when Christ gave the preceding power of jurisdiction to the church, he left it to the discretion of the church to decide on its application to persons and how to apply it to

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[130] *Opus septipartitum*, q. 2, sig. C1r: "Dicendum ad primum dato quod concluderet quod omnino essentialiter posset ei auferri talis potestas prout consideratur materialiter et respective, quia ut sic est variabilis et mutabilis, tamen absolute considerata non est abdicabilis ab ecclesia, quia quam diu manebit ecclesia, tam diu manebit potestas illa, et etiam si illa potestas consideretur ut fuit in apostolis, fuit forte illis inauferibilis, quoniam non per humanam electionem et confirmationem vel institutionem eam acceperunt, sed per divinam, ideo solum per divinam destitutionem potuissent (ut videtur) ea fuisse privati."

[131] *Opus septipartitum*, q. 2, sig. B7r: "Dicitur quinto, ratione caracteris ad tangendum titulum vel fundamentum illius dominii. Eius enim fundamentum est caracter impressus a Deo. Et in hoc differt ab aliis dominiis, quia alia habent alia fundamenta ut patuit."

[132] Summenhart states that in the case of *beneficium curatum simplex* the tonsured person receives canonical dominion but not evangelical dominion. *Opus septipartitum*, q. 2, sig. B8r: "Ad primum dicendum quod ex predicta investitura non habet predictus tonsorista potestatem iurisdictionis evangelice vel divine de qua sola nunc loquimur, unde illa de que procedit argumentum (si vera sunt que assumit) est tamen canonica et humana, et illa potest fundari in sola clericatura vel prima tonsura etiam tenendo opinionem theologorum quod prima tonsura non impirmat caracterem dummodo prime tonsure accesserit electio et confirmatio, vel alia equivalens canonica actio humana."

them." Thus, the church has a certain freedom of action in defining the qualifications for possessing evangelical dominion. Summenhart notes that "if the church conferred it also on someone who does not have the ordinal character, then this collation would hold, at least provided that this person would be a cleric." Here, the minimum requirement is that the ecclesiastical power of jurisdiction cannot be given to the layman who has not entered the clerical state. In this sense ecclesiastical power remains characteristic of the official church.[133]

Having explained his definition of evangelical dominion, Summenhart draws attention to the fact that his definition does not take a stand on the qualification "is able to belong equally to several." The reason is simply that evangelical dominion as a whole could not be classified with respect to this feature.[134] According to Summenhart, the power of consecrating the Eucharist is the only power that is "able to belong equally to several" without qualification. In fact, "it exists equally in all priests, in the supreme, who is the pope, as well as in the lowest

[133] *Opus septipartitum*, q. 2, sig. B8v: "Unde tenendo opinionem theologorum, et ponendo sub disiunctione in diffinitione dominii evangelici caracterem vel clericaturam propter predictum casum diceretur quod Christus conferendo ecclesie predictam potestatem iurisditionis dimisit in arbitrio ecclesie pendere applicationem eiusdem ad personas et modum applicandi eadem ad eas, ita ut si ecclesia conferret eam alicui etiam non habenti caracterem ordinalem, teneret illa collatio, dummodo saltem ille esset clericus. Si autem nollet conferre alicui nisi habenti caracterem ordinalem talem vel talem, non teneret collatio facta alicui non habenti caracterem ordinalem. Sicut in simili dicimus quod Christus instituit quod minister confirmationis sit ad minus sacerdos. An autem debeat habere ulteriorem ordinem vel consecrationem quam sacerdotium, misit pendere in arbitrio ecclesie adeo etiam quod ecclesia nolente quod simplex sacerdos confirmet seu ungat in fronte, talis si attemptet nihil facit." Summenhart's abundant use of the conditional tense in this passage is worth noting, for its implication is clear: the church has not yet made the decision to concede the ecclesiastical power of jurisdiction to the tonsured, and therefore his own definition of evangelical dominion need not be altered. The disparity between the original question and Summenhart's explanation can also be seen. Summenhart appears to be utilizing the conciliarist principle that the ecclesiastical power of jurisdiction was given to the church as a whole with the idea that the church may administer it according to its discretion. This is a rare occasion on which Summenhart speaks of ecclesiastical power as possessed by the church as a whole.

[134] *Opus septipartitum*, q. 2, sig. B7v: "Et si queras quarto, quare in hac descriptione non ponitur ut in descriptionibus precedentium dominiorum, illa clausula, scilicet pluribus competens ex equo. Respondetur, ratio est, quia quelibet clausula descriptionis debet cuilibet contento sub diffinito competere. Modo non quodlibet dominium evangelicum seu potestas ecclesiastica competit pluribus ex equo, licet alique conveniat pluribus ex equo."

priest."[135] All other powers of evangelical dominion are hierarchically qualified. Summenhart explains that jurisdictional powers in the external forum as well as the power of administrating the sacraments of order and confirmation belong exclusively to the bishops. Furthermore, not even the bishops possess these powers equally. One, namely, the pope, has greater power than all the other bishops, because the pope's power extends to all Christians, whereas a bishop's power is confined to his own diocese.[136] Summenhart maintains that the power of preaching the doctrine and conferring the sacraments of baptism and the Eucharist belongs to all priests equally. However, he stresses that this is true of the essence of this power, but not as far as the use of the power is concerned. According to him, a priest can licitly exercise this power only in his own parish. From this it follows that the pope has unrestricted use of this power, whereas its by the other priests is restricted.[137] The official hierarchy is also mirrored in

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[135] *Opus septipartitum*, q. 2, sig. B7v: "De secundo accipe exemplum, illa potestas ecclesiastica ordinis que est ad consecrandum verum corpus Christi, est equaliter in omnibus sacerdotibus tam in supremo qui est papa quam in infimo sacerdote, adeo ut respectu eiusdem hostie consecrande equalem potestatem habeat infimus sicut supremus, et non solum de facto est equalis in eis et in uno non restrictior quam in alio, sed etiam est illimitabilis." Summenhart explains this by saying that "the lowest and the supreme have equal power in respect to the consecration of the same *hostia*." Here, we may spot the relational language so typical of Summenhart in which "equal power" means a similar power of agency with respect to the same object. Following Gerson, Summenhart concludes that the power of consecrating is not only *de facto* equal in all the sacerdotes, but it is also illimitable. Summenhart does not explain what he means by "illimitable," but, like Gerson, he seems to be referring to the essence of power and does not intend to claim that the exercise of power could not be limited by the law (*de iure*). On this point Gerson noted that also the heretic or excommunicated priest possesses the power of consecrating. See Gerson, *De potestate ecclesiastica*, consideratio 2, 228.

[136] *Opus septipartitum*, q. 2, sig. B8r: "Secundum exemplum. Ecclesiastica potestas iurisditionis fori exterioris non est equalis in omnibus ecclesiasticis personis, nec in omnibus sacerdotibus, quam multi non habent eam non solum de iure, sed etiam nec de facto, sic quod si attemptarent excommunicare et absoluere ab excommunicatione nihil facerent. Sed nec est equalis in omnibus habentibus eam. Nam inter habentes illam potestatem iurisditionis unus ut papa habet maiorem alio. Nam talis etiam ex Christi institutione habet eam super omnes Christi fideles, nullus autem aliorum prelatorum habet tantam ex Christi institutione."

[137] *Opus septipartitum*, q. 2, sig. B7v: "De primo autem accipe tria exempla in quibus patebit non omnem potestatem ecclesiasticam esse equaliter in omnibus. Primum, ecclesiastica potestas ordinis super mysticum corpus Christi in illuminando per doctrinam predicationis, et perficiendo per collationem sacramenti confirmationis eucharistie et ordinis atque purgando per sacramentum baptismi non est equaliter in omnibus sacerdotibus patet tripliciter. Primo, nam in sacerdotibus illis qui non sunt

jurisdictional power in *forum internum*. In making reference to the *Liber extra* (X.3.29), Summenhart notes that the pope has this judicial power over all believers, whereas the bishop has this power only over those people who are subordinated to his seat. Further, the parish priest possesses less power than the bishop, because the parish priest's power is confined to the inhabitants of his parish. At the level of a local parish, however, jurisdictional power in the internal forum can belong equally to several priests. According to Summenhart, this can take place when two or three priests are appointed to the same parish in an equal way.[138]

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episcopi, non est potestas conferendi ordines et confirmationem, adeo quod etiam non solum de iure non possunt sed nec etiam de facto, sic quod si attemptarent ordinare vel confirmare, nihil facerent. Sed et secundo nec illa est equaliter in omnibus episcopis qui tamen habent eam quoniam maiorem habet illam papa quam inferiores, quia papa in omnes habet, sic non alii qui tamen habent in sibi subditos exercere illam potestatem. Similiter et tertio patet de potestate predicandi et conferendi eucharistiam et baptisandi, que non est equaliter in omnibus sacerdotibus, quam licite illam non exercent quo ad hec omnia nisi habentes plebem subiectam. Et unus ut episcopus ampliorem habet quanto ampliorem plebem habet subiectam, unde licet essentialiter illa potestas sit equalis in omnibus habentibus et quantum est ex parte habentium eam, tamen non est equalis in eis in usu eius quantum est ex parte eorum in quos est exercenda, quia in uno est irrestricta ut in papa, in aliis est restricta. Unde generaliter in papa est plenitudo potestatis ecclesiastice que etiam significatur per pallium. Ceteri autem sunt in partem sollicitudinis et non in plenitudinem potestatis vocati, ut in c. ad honorem. de auc. et usu pallii. Item etiam inter illos alios in quibus est restricta, in uno est restrictior ut in plebano quam in alio ut in episcopo, quanto uni concessum est eam exercere in plure quam alteri." The use of ecclesiastical power is thus defined by the hierarchy. Summenhart follows Gerson in adding that, historically, the restrictions on the use of ecclesiastical power had already originated in the time of the apostles and their disciples. According to him, when Christ gave ecclesiastical power to the Church and the number of believers grew, limitations were imposed on the use of this power. In consensus with the early church or the general council, the highest pontif Peter decided, that not everyone may use this power in everything, but that the church was to be ruled, as Christ wanted, principally by one monarch, because this is the optimal leadership, especially in spiritual matters, for conserving the unity of the Christian faith. *Opus septipartitum*, q. 2, sig. B7v. See Gerson, *De potestate ecclesiastica*, consideratio 9, 238.

[138] *Opus septipartitum*, q. 2, sig. B8r: "Tertium exemplum. Ecclesiastica potestas iurisditionis fori interioris non est equalis in omnibus. Nam papa habet illam super omnes fideles, non tantam habet episcopus, quia ille tamen super homines sue sedis, ut in capitulo nullus, de parochiis et alie, parochis. Nec tantam habet plebanus quantam episcopus, quia plebanus tamen habet in suos parochianos, ut in c. ecclesias, xv, q. i. c. ecclesias. Si autem essent duo vel tres plebani dati eidem populo ex equo, iam equalis esset potestas iurisditionis fori interioris in eis respectu plebis."

3.1.5. *Canonical dominion*

Summenhart says that the canonical dominion "is dominion appropriate to someone according to the human canon laws."[139] This definition explains his interpretation of "dominion according to canon law," which was how Gerson described *dominium canonicum* in *De potestate ecclesiastica*. Summenhart includes the attribute "human" in his definition to underline the characteristics of canon law as man-made. With this emphasis, Summenhart was following Gerson who, in *De vita spirituali animae*, had treated canon law as human law that also contains principles derived from divine and natural laws.[140] Likewise, in his theory of dominion, Gerson treated canonical dominion as human dominion, using the term "civil dominion" as an umbrella concept that referred not only to civil dominion but also to canonical dominion.[141]

Owing to this broad usage of "civil dominion" in *De vita spirituali animae*, Gerson did not discuss canonical dominion separately, a decision that affects Summenhart's discussion. In a way corresponding to this apparent lack of textual material, Summenhart does not base his discussion of canonical dominion on a detailed definition as he had done in discussing other species. Instead, he adopts an alternative course of action and elucidates canonical dominion with the help of examples.

Summenhart clarifies the canonical dominion with seven examples. The last example, which concerns the dominion possessed by the pope, is linked to Gerson's account in *De vita spirituali animae*. Summenhart borrows the other examples from juridical discourse, refers to the details of ecclesiastical legislation, and consults canon lawyers. The basic idea implicit in Summenhart's discussion is that

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[139] *Opus septipartitum*, q. 2, sig. C1r: "Dominium autem canonicum sic describitur. Est dominium conveniens alicui secundum leges humanas canonicas."

[140] See Gerson, *De vita spirituali animae*, lectio 2, 16–25. Gerson maintained that in the early church, there was no clear distinction between evangelical and canon law. However, as the church grew, it became necessary to establish canon laws church governance. For Gerson, these canon laws were human laws, although they contained principles derived from divine and natural laws. According to Gerson, failure to understand this mixed nature of canon law has caused many disturbances in the church. For Gerson's view of the law, see Pascoe 1973, 49–79.

[141] For example, Gerson maintained that: "…nullum denique crimen occultum tollit civile Dominium, sive illud sit Canonicum & spirituale, Dominium, sive Legale et temporale." *De vita spirituali animae*, lectio 3, 33.

each of these cases exemplifies a right that is defined and conceded to the right-holder by the canon law. From this it follows, through the equivalence of *ius* and *dominium*, that the examples are truly representative of canonical dominion.

Summenhart makes use of this general idea in discussing the first example, which is "the right of patronage (*iuspatronatus*) that is possessed by the patron of a benefice." To justify its nomination as a canonical dominion, he first observes, that the right of patronage fulfills the description of a right; therefore, it is dominion. Further, he continues, canon law concedes *iuspatronatus* to a person who is the patron of a benefice.[142] In that way *iuspatronatus* corresponds to the definition of canonical dominion, which it is supposed to elucidate. Summenhart also finds a way to justify the nomination of *iuspatronatus* as canonical dominion without applying the equivalence of *ius* and *dominium*. He refers to Hostiensis's (d. 1261) *Summa* and notes that in juridical language, the right of patronage is sometimes called *vicedominatus* and the patron *vicedominus*. Summenhart uses this terminology to validate his conclusions, because "the person who bears the deputyship of a dominion has a certain dominion, if not such a dominion of which he is the deputy, then in any case another one, which is subordinated to such a dominion."[143]

As *iuspatronatus*, Summenhart's second example also concerns the canonical dominion possessed by secular authorities: the right of investiture. Summenhart recalls that in the history of the church, certain emperors had the right to invest bishops and archbishops and even to choose the popes. Making reference to the *Decretum*, Summenhart points out that this dominion was conceded to the emperors by canon law (D.63 c.22 and c.23), as it was later taken from them

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[142] *Opus septipartitum*, q. 2, sig. C1r: "Exemplum, ius quod habet patronus alicuius beneficii est dominium canonicum, probatur dupliciter. Primo quia tale ius est ius, igitur est dominium, tenet consequentia, quia ius et dominium convertuntur, prout patuit supra questione prima, et illud dominium convenit suo subiecto secundum leges canonicas. Nam lex canonica ei qui est patronus alicuius beneficii concedit iuspatronatus."

[143] *Opus septipartitum*, q. 2, sig. C1v: "Secundo probatur quod iuspatronatus dici possit dominium. Nam iuspatronatus aliquando vocatur vicedominatus et patronus vicedominus, sicut et etiam aliquando vocatur advocatia, custodia, guardia, quandoque ius frequentationis vel processionis que omnia pro eodem supponunt. Si igitur iuspatronatus vocatur vicedominatus et patronus vicedominus, igitur potest dici dominium. Nam qui vices gerit domini habet aliquod dominium, et si non illud cuius vices gerit tamen aliud illi subordinatum."

(C.16 q.7 c.12).[144] Summenhart explicitly contrasts this canonical lay investiture to the evangelical dominion possessed by the bishops. By making reference to Gerson's *De statibus ecclesiasticis* (*De statu praelatorum, consideratio* 6), Summenhart maintains that the bishops have the right of investing ecclesiastical persons with ecclesiastical offices by evangelical concession, and not merely by canon law.[145]

With the third example, Summenhart shifts to a discussion of canonical dominion, which the church appropriates for its officials. This example is the parish priest's right of receiving a fourth of the funeral dues (*quartam partem funeralium*). Summenhart refers to the decretal *Dudum de sepulturis* by Clement V (Clem. 3.7.2) and concludes that a fourth of the funeral dues, otherwise called the canonical portion, is appropriate to the parish priest by the positive law of the church.[146]

Summenhart's fourth and fifth examples concern the basic financial instruments of the medieval church. In this context the basic idea of canonical dominion as human dominion increases in importance with interesting results. As the fourth example of canonical dominion,

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[144] *Opus septipartitum*, q. 2, sig. C1v: "Secundum exemplum. Ius investiendi episcopos et archiepiscopos, immo et eligendi pontifices et ordinandi sedem apostolicam quod habuerunt quidam imperatores, fuit dominium canonicum, quia eis conveniebat tantummodo ex canonica concessione ecclesie que eis illud ob eorum favorem quem erga ecclesiam habebant et zelum concessit, ut patet dis. lxiii, Adrianus, et c. in sinodo, sicut et eis postmodum hoc ius fuit subtractum, ut patet, xvi, q. vii, c. si quis."

[145] According to Summenhart, Gerson, in his tract *De statibus ecclesiasticis* (*De statu praelatorum*, *consideratio* 6), had said that the episcopal status has by itself and by Christ's first institution the right to institute minor prelates. Summenhart also reports Gerson as saying that the episcopal status had, by Christ's institution, the right to confer ecclesiastical benefices or temporal stipends, and on this point Summenhart disagrees with Gerson. Summenhart maintains that Gerson's claim is untrue because the first bishop, namely, St. Peter, did not possess the right to confer ecclesiastical benefices. Yet, Summenhart remarks, that Peter had every right that was given directly by Christ to the episcopacy. Summenhart also notes that Gerson, in his *De vita spirituali animae*, acknowledged that the right of conferring ecclesiastical benefices seems to fall to the bishops by canonical concession. In concluding this point, Summenhart states that the right of conferring ecclesiastical benefices or instituting priests to these, seems to fall to the bishop by canonical concession. For further evidence, he refers to Panormitanus who, against the view of Johannes Andrae, posited (in c. ex frequentibus, de institutionibus) that the institution in benefices pertains to the bishop on account of *ius commune*. Ibid., sig. C1v.

[146] *Opus septipartitum*, q. 2, C1v: "Tertium exemplum. Ius quod habet plebanus accipiendi quartam partem funeralium que pars alius dicitur portio canonica, est ius et dominium canonicum, convenit enim ei iure positivo id sibi concedente, in Clementina, dudum, de sepulturis." In general, the canonical portion was related to situations in which a parishioner was buried outside the parish limits.

Summenhart offers the parish priest's right to take tithes from members of his parish. A few years earlier, Summenhart had written an entire treatise, *Tractatus bipartitus de decimarum* (1497) on the legitimacy of tithing. Now, he repeats the basic argument of that treatise and maintains that the right to tithes is appropriate to the priest by the positive law of the church, which can be verified in the *Decretum* (C.16 q.7 c.5) and by the many chapters in decretals with the title *De decimis* (X 3.30).[147]

Summenhart recognizes though, that one might argue that the right to tithes is a divine dominion and not a canonical one, because in the precepts of the Old Law (Numbers 19 and Leviticus 23), the sons of Levi were conceded the right of collecting tithes from the people of Israel and vice versa the sons of Israel were required to tithe. However, Summenhart rejects this line of thinking by stressing that this particular regulation belongs to the judicial constitutions of the Old Law, and the obligation created by these constitutions has ceased to exist as far as Christians are concerned.[148]

> Therefore, the parish priests do not have the right to receive tithes by a concession of Mosaic law, which was abolished, nor are the subjects obliged to give tithes by the obligation of that law, but they are obliged to this solely by positive canon law, although they are obliged by natural law to give temporal stipends to the same priests who perform spiritual services for them, but by natural law they are not obliged to a fixed portion, that is one tenth, of their profits.[149]

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[147] *Opus septipartitum*, q. 2, sig. C1v: "Quartum exemplum. Ius accipiendi decimas a populo suo quod plebanus habet, est canonicum dominium, convenit enim ei iure positivo ut patet, xvi, q. vii, c. omnes decime, et per multa capitula in decretalibus in titulo de decimis."

[148] *Opus septipartitum*, q. 2, sig. C1v: "Et si arguas, divina lege convenit sibi illud ius, igitur non est canonicum. Antecedens probatur, quia Numeri, XVIII, dicit dominus Filiis levi dedi omnes decimas israelis in possessionem pro ministerio quo mihi seviunt in tabernaculo, et Leviticus, XXVII. Omnes decime terre sive de frugibus sive de pomis arborum, domini sunt, et illi sanctificantur. Dicendum lex concedens levitis ius percipiendi decimas, et precipiens filiis israel dare decimas est consitutio iudicialis veteris legis, talium autem constitutionum obligatio cessavit."

[149] *Opus septipartitum*, q. 2, sig. C1v: "…ideo plebani non habent ius percipiendi decimas ex concessione mosaici legis abolite, nec subditi ex obligatione legis predicte obligatur ad dandum decimas, sed solo iure positive canonico ad id obligantur, licet iure naturali obligentur ad hoc ut dent temporalia stipendia eisdem plebanis ministrantibus eis spiritualia, ad quottam autem determinatam, utputa ad decimam partem suorum fructuum non obligantur lege naturali."

Although Summenhart's purpose is not to dispute the parish priest's right to receive a reward for his work in the care of souls, his interpretation carries a revisionist emphasis. His point is that the priest's right to collect tithes has no other direct foundation than human canonical legislation. In Summenhart's terminology, to label an ecclesiastical institution a canonical dominion is to deny the direct divine origin of that institution. This involves justifying the practice of tithes, which was one of the principal instruments for financing the official church and which becomes a matter open to critical assessment and even rearrangement.[150]

Seemingly aware of the fundamental weight and controversial nature of this question, Summenhart refers to his treatise *De decimarum* for a fuller discussion of the issue. Before closing his discussion, Summenhart notes that there is no small problem between theologians and lawyers on this point. He reports that many lawyers go as far as to label the claim that tithes are not prescribed by divine law as heretical.[151] Against this interpretation Summenhart remarks that it would be heretical to claim that tithes were part of the divine law that is in force, because to claim this would be to claim that the judicial law of Moses is still binding today.[152]

Summenhart's fifth example of canonical dominion concerns another instrument by which the medieval church provided income

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[150] Despite its moderate tone, Summenhart's critique had the potential for major social and political upheavals. In Summenhart's time dissatisfaction with the practice of tithes was common, for tithes and various ecclesiastical dues were constantly rising and placed a heavy burden on peasants and the poorer classes in the towns. Furthermore, because in late medieval feudal society there was no clear distinction between tithes and taxation, Summenhart's critique had broader implications than what was explicitly stated. Oberman 1981, 116.

[151] Summenhart was apparently referring to Innocent IV and Antoninus de Butrio. Oberman 1981, 119.

[152] *Opus septipartitum*, q. 2, sig. C1v: "De hoc tamen est propleuma non parvum inter theologos et iuristas, adeo ut nonnulli iuristarum reputent quasi hereticum dicere quod decime non sint de iure divino sed si intelligant quod sint de iure divino hodie obligante, quo ad determinatam quottam potius eorum dictum est quasi hereticum quia est dicere quod lex Moysi hodie obliget quo ad iudicalia, nam quo ad quottam non est morale, sed tamen iudiciale, licet secundario sit cerimoniale, sed de hoc diffuse dixi in tractatum de quotta decimarum." As did medieval authors in general, Summenhart apparently believes that, of the regulations of the Old law, only moral regulations are still valid as far as Christians are concerned. His full treatment of the case of the tithes is found in *Tractatus bipartitus de decimis* (1497), which was printed three years before *Opus septipartitum*. For Summenhart's arguments there, see Oberman 1977, 147–157.

for its officials: the ecclesiastical benefice. Summenhart says that the right of having fixed revenue that is connected to an ecclesiastical office is a canonical dominion, because it is granted to the person who is legitimately instituted or confirmed in the benefice by canon law.[153] Summenhart treats *beneficium ecclesiasticum* in a way that supports the critical point he has made previously in dealing with the matter of tithes. First, he suggests that one could argue that the ecclesiastical benefice is a natural *dominium* because "natural law disposes that temporal stipends are to be given to those who harvest spiritual seeds."[154] After raising this argument, he disproves it by repeating the same point as in the case of tithes, but this time in a semantic argument. He admits that the right of collecting temporal stipends is indeed appropriate to the holder of an ecclesiastical office according to natural law. However, Summenhart stresses that here the term "stipends" supposits confusedly. Thereby, "stipends" does not supposit for a payment "the quality and value of which are determined." To conclude his discussion, Summenhart observes that "the similar point was made concerning the tithes in the preceding example." Fixed-value payments have no direct basis other than the positive law of the church.[155]

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[153] *Opus septipartitum*, q. 2, sig. C2r: "Quintum exemplum. Ius levandi temporalia determinata (quod ius alio nomine vocatur beneficium ecclesiasticum) annexum alicui officio ecclesiastico convenit ei qui est ad illud beneficium presentatus per patronum (si est patronatum beneficium) vel electus (si est beneficium electivum, id est quod per electionem confertur) postquam fuerit ad idem legitime institutus vel in eo confirmatus, hoc est canonicum ius vel dominium, quia convenit ei tunc secundum leges canonicas…" Here Summenhart recognizes two kinds of benefices: *beneficium patronatum* and *beneficium electivum*. As far as the foundation of this dominion is concerned, Summenhart suggests that the foundation for the *beneficium patronatum* is the canonical institution to the benefice and for the *beneficium electivum*, the confirmation of the election. He notes that also the ecclesiastical office can be taken as the foundation of the benefice, because the benefice belongs to the person by reason of the office. Ibid.

[154] *Opus septipartitum*, q. 2, sig. C2r: "Contra hoc arguitur, habenti officium ecclesiasticum convenit lege naturali beneficium ecclesiasticum, igitur non lege canonica. Antecedens probatur, quia lex naturalis disponit quod seminantibus spiritualia aliis, dari debeant temporalia stipendia, beneficium autem ecclesiasticum est ius percipiendi temporalia stipendia, igitur."

[155] *Opus septipartitum*, q. 2, sig. C2r: "Dicendum quod habenti officium ecclesiasticum convenit lege naturali ius percipiendi temporalia stipendia, prout ly stipendia supponit confuse tamen, non autem ius percipiendi stipendia determinata tanta quantitate vel tali qualitate. Modo hoc loquimur de beneficio ecclesiastico, prout est ius percipiendi stipendia determinata in quantitate et qualitate. Simile habitum est de decimis in precedenti exemplo."

Summenhart's sixth example of canonical dominion incorporates the idea of canonical subjection, which he had developed earlier in discussing evangelical dominion. This dominion is "the power or superiority, which the person who becomes canonically instituted for the office of a parish priest acquires in relation to the parish." For Summenhart, the title "canonical dominion" derives from a new kind of subjection in which the parish is subjected to the instituted priest. Summenhart explains that, as this new subjection is canonical in nature, similarly the superiority corresponding to the subjection is canonical and acquired by the canonical institution.[156]

Summenhart's seventh and last example leads him to discuss the various dominions possessed by the pope and to continue his commentary on *De vita spirituali animae*. Summenhart refers to the passage in its *lectio tertia* in which Gerson pointed out that the pope has several kinds of dominion. Gerson also emphasized that it is important to recognize the differences among these species of dominion, for if one cannot or does not want to understand the distinctions correctly, this will lead to false reasoning.[157] The account in which Gerson then explained the differences among the pope's various dominions forms the subject of Summenhart's commentary.

> The seventh example: The pope has a four-fold dominion, right, or power. The first of these is appropriate to him by pure evangelical law, the second by canon law, the third by civil law, the fourth by natural law, just as Johannes Gerson, in effect, wanted to say.[158]

According to Summenhart, the pope's first dominion includes 'the plenitude of ecclesiastical power in all its fullness.' Following his earlier interpretation, Summenhart assimilates this power into the pope's evangelical dominion. Further, he notes that in this dominion is included "the pope's dominion of superiority over the entire church,"

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[156] *Opus septipartitum*, q. 2, sig. C2r: "Sextum exemplum est potestas vel superioritas quam canonica institutione institutus in plebanum acquirit in plebem, ex hoc quod plebs sibi de novo subiicitur subiectione canonica dicitur dominium canonicum. Nam sicut nova subiectio plebis est canonica ita superioritas correspondens illi subiectioni de novo, est canonica et per canonicam institutionem acquisita. De hoc exemplo patuit in precedenti dominio circa tertium dubium seu questiunculam."

[157] Gerson, *De vita spirituali animae*, lectio 3, 34.

[158] *Opus septipartitum*, q. 2, sig. C2r: "Septimum exemplum. Papa habet quadruplex dominium ius seu potestatem. Quorum primum sibi convenit lege evangelica pura. Secundum lege canonica. Tertium lege civili. Quartum lege naturali prout in effectu vult Johannes Gerson."

a superiority given to the pope for the sake of ecclesiastical power. Following Gerson, Summenhart specifies that both the plenitude of ecclesiastical power and the dominion of superiority concern that which "belongs to the spiritual regime of the church properly speaking." Thereby, the pope has, by example, the right to call together the universal council, to determine along with the council questions of faith in a way that is generally binding on all believers, to correct inferior prelates, and finally, to depose these prelates from their offices altogether in the event of an offense.[159]

Summenhart stresses that both evangelical dominion and the dominion of superiority were given to St. Peter and his successors by Christ, as can be verified from several chapters on evangelical law and in the Book of Acts. Further, he maintains that these powers were handed to subsequent popes through the apostolic succession in all certainty, so that "those who want to diminish or destroy this power are rightly judged to be reckless, scandalous, or even schismatic."[160]

As the pope's canonical dominion, Summenhart cites the power of conferring and ordaining or regulating ecclesiastical benefices, which are connected to spiritual ecclesiastical rights.[161] Summenhart locates the origin of this power in the canonical institutions, which concede the pope the power of conferring ecclesiastical benefices and ordaining

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[159] *Opus septipartitum*, q. 2, sig. C2r: "Primum igitur dominium est potestas ecclesiastica in omni plenitudine sua, que potestas supra vocata est dominium evangelicum similiter dominium superioritatis supra totam ecclesiam cum predicta plenitudine potestatis in eis que spirituale regimen ecclesie proprie dictum respiciunt. Et hoc dominium est ius ad faciendum illa quattuor, et si qua similia sunt, scilicet. Primo ad convocandum concilia universalia. Secundo ad determinandum cum concilio questiones fidei per modum articulorum generaliter omnes obligantium. Tertio ad corrigendum prelatos inferiores. Quarto ad destituendum eosdem totaliter a suis officiis si demeruerint, et ad alia similia faciendum, que vel universalem ecclesie statum tangunt vel finalem supremanque determinationem respiciunt."

[160] *Opus septipartitum*, q. 2, sig. C2r: "Et quod Christus concesserit Petro et successoribus eius potestatem ecclesiasticam tam ordinis quam iurisditionis satis patet ex lege evangelica in illis locis que allegata sunt supra circa dominium evangelicum. Sed quod propter illam potestatem ecclesiasticam etiam concesserit primo pape scilicet Petro tale dominium superioritatis super alios et in Petro successoribus eius quales sunt pape posteriores, cognoscitur ex lege evangelica, et ex actibus apostolorum, et ex eis que per successivam relationem eorum ad nos tanta certitudine sunt devoluta, ut merito temerarius et scandalosus, immo scismaticus iudicetur qui potestatem hanc vel abolere vel diminuere presumpserit."

[161] On this point, Gerson's characterization was broader. For him, the pope's canonical dominion signified power over those ecclesiastical things that are spiritual things, improperly speaking. As an example, he mentioned the power of conferring ecclesiastical benefices and jurisdictions. Gerson, *De vita spirituali animae,* lectio 3, 34.

and regulating them. As for the pope's civil dominion, Summenhart cites his earthly power in certain lands, which the pope possesses, not by his office, but "by the consent of both the princes, especially emperors, as well as the subjects." As an example, Summenhart refers to the Donation of Constantine, and says that Emperor Constantine gave Pope Silvestro and his successors this kind of earthly power in certain territories. Thereby, the origin of this power was in the donation, which meant consequently, that the power was appropriate to the pope according to civil law. In order to prove that these two dominions are distinct from the evangelical dominion possessed by the pope, Summenhart refers to the example of Peter. He points out that Peter had all the power appropriate to the pope by evangelical law from Christ's constitution. Yet Peter and many of his successors did not possess the power of conferring ecclesiastical benefices or of any mundane powers, which implies that evangelical dominion did not include these powers.[162]

By the pope's natural dominion Summenhart means the power that any superior authority has over his subjects as a consequence of his superiority. Summenhart recognizes that this natural dominion presupposes the evangelical dominion of superiority. The pope is constituted as superior to all belivers in Christ, and, for this reason, he has the right to receive honor and assistance from the subjects, so that the subjects are bound to show honor and give assistance to him, as their superior, tutor, and defender. Similarly, the pope has the

[162] *Opus septipartitum*, q. 2, sig. C2v: "Secunda potestas est potestas conferendi aliqua beneficia ecclesiastica et de eis ordinandi vel disponendi in temporalibus rebus ecclesiasticis, id est que annexe sunt spiritualibus iuribus ecclesiasticis, et hec secunda differt a prima secundum Johannem de gersona adeo quod quidam nominatim greci primam concedentes, secundam abnegent. Unde hec secunda convenit sibi per canonicas institutiones quibus conceditur pape potestas conferendi beneficia et de eis ordinandi et disponendi. Non autem lege evangelica sibi illa potestas concessa est sicut precedens, quia Petrus habuit omnem potestatem que lege evangelica ex Christi constitutione convenire debet pape, et tamen Petrus et multi successores eius caruerunt predicta potestate, igitur signum est quod non lege evangelica convenit sibi. Tertia potestas est potestas terrena in quibusdam terris quam habet ex consensu tam principum presertim imperatorum quam aliorum subditorum, qualis est potestas terrena super illas terras quas imperator Constantinus dedit Sivestro et successoribus eius, hec potestas convenit sibi ex donatione, et per consequens secundum leges civiles, quibus conceditur dominium rerum illis quibus res tales sunt legitime donate. Non autem convenit lege evangelica sibi, quoniam Petrus omnem habuit potestatem que ex Christi institutione de lege evangelica convenire debet pape, et tamen Petrus et successores usque ad Sivestrum caruerunt illa potestate terrena, igitur sigum est quod non convenit pape lege evangelica."

right to receive stipends from his subjects. Summenhart stresses that, although the superiority is appropriate to the pope by evangelical law, the right to accept honor, assistance, and stipends from those for whom he fights, is appropriate to the pope by natural law. This is because natural law concedes this right to every superior, regardless of whether the superiority is due to some other law, even human law.[163]

3.1.6. *Civil dominion*

Summenhart's discussion of civil *dominium* reveals an attitude to Gerson's language that differs to a certain extent from his discussion of the other species of dominion. Although Summenhart bases his discussion on definitions, as is his normal practice, he does not introduce any definition of his own making. Instead, he is fully content with the two descriptions of civil dominion that he has taken from the text of *De potestate ecclesiastica*.

> Civil dominion is described first, as follows: it is dominion according to civil law. Secondly and fully as follows: it is dominion introduced by reason of sin, is not able to belong equally to several, is retainable and alienable whenever charity is preserved or not preserved, is founded on civil and political laws.[164]

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[163] *Opus septipartitum*, q. 2, sig. C2v: "Quarta potestas, est potestas consequens superioritatem superioris ad subditum suum. Nam ex hoc quod a Christo lege evangelica constitutus est superior omnium christifidelium, consequenter habet talem potestatem in christifideles, qualem ex lege naturali quilibet superior habet in suos subditos. Et hec potestas est ius recipiendi a subditis honorem et auxilium, ita quod subditi tenentur honorem et auxilium prestare sibi tamquam suo superiori tutori et conservatori, qui pro omnibus militat curam que gerit et ita eorum stipendiis (si sibi deessent) militare debet unde licit dominium superioritatis super totam ecclesiam conveniat sibi lege evangelica, tamen quod ipse consequenter ad illud dominium habeat ius recipiendi honorem et auxilium vel stipendia a suis inferioribus pro quibus militat, hoc habet lege naturali, quia lex naturalis concedit unicuique superiori qui curam gerit regendi alios ius talia recipiendi ab eis, non obstante quod superioritas illi conveniat alia lege etiam humana, ut si per humanam constitutionem mediante electione alicui conveniat superioritas in aliquos, nihilominus illa adepta, postea convenit sibi lege naturali ius recipiendi predicta a subditis."

[164] *Opus septipartitum*, q. 2 sig. C2v: "Dominium civile describitur primo sic. Est dominium secundum legem civilem. Secundo plenius sic. Est dominium peccati occasione introductum, non competens pluribus ex equo, retinibile et abdicabile servata vel non servata charitate fundatum in legibus civilibus et politicis." This second definition is not exactly similar to the description that Gerson had presented in *De vita spirituali animae*. There he described the alienability of civil dominion with the expression "retainable and alienable whenever charity is preserved." This expression paralleled the characterization of evangelical dominion: "inalienable whenever charity is preserved." In *De potestate ecclesiastica* Gerson added the expression "or not preserved,"

It is characteristic of Summenhart's viewpoint that he sees civil dominion as a category of private property and ownership. As an example of civil dominion, he says that when a person "accepts a gift or buys a book or a horse, and this is delivered to him, he has civil dominion of this horse or the book." A similar proprietorial emphasis appears in his explanation of the clause "introduced by reason of sin," which opens the second or full definition of civil dominion. Summenhart maintains that if mankind had remained in its state of innocence, civil dominion would not have been introduced, because in that condition all things of this world would have been common to all men. Sin was thus the reason for the introduction of civil dominion, which resulted in the appropriation of things: "This dominion has to do with the appropriation of things."[165] According to Summenhart, the introduction of civil dominion was a reasonable course of action. Yet he also remarks, repeating Gerson, that because the root of civil dominion is sin, it is no wonder that civil dominion is seldom exercised without the contamination by some defect. Summenhart thus seems to endorse the idea that the cause is present in the effect, at least to a certain extent.[166]

The exclusive nature of civil dominion is expressed in the characteristic "not able to belong equally to several." Summenhart does not give any explanation for this clause, but simply says that in this respect, civil dominion differs from the first four species of dominion, namely, beatific, original, and evangelical dominion, and the dominion of grace.[167]

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which stressed the independence of civil dominion from divine charity. Further, Gerson complemented his description in *De vita spirituali animae* by adding the final characteristic: "founded in civil and political laws." See Gerson, *De vita spirituali animae*, lectio 3, 30 and Gerson, *De potestate ecclesiastica*, consideratio 13, 253.

[165] *Opus septipartitum*, q. 2, sig. C2v: "Exemplum, aliquis dono accepit vel emit equum vel librum, et sibi traditur, ille habet civile dominium illius equi vel libri. Quam variis autem modis acquiratur et transferatur hoc dominium in alium patebit infra, q. xi. Dicitur primo notanter, peccati occasione introductum. Nam si mansissemus in statu innocentie, hoc dominium introductum non fuisset, quam tunc fuissent omnia communia. Hoc autem dominium est cum appropriatione rerum."

[166] *Opus septipartitum*, q. 2, sig. C2v: "Quomodo autem et quare rationabile fuerit propter lapsum humani generis a statu innocentie hoc dominium civile introducere, quod est cum rei appropriatione patebit, q. IX. Propterea nimirum si civile dominium quod occasione peccati introductum est, et ita radicem habens infectam, illius saporem contrahet, et vix exerceatur absque contaminatione aliquorum delictorum, ut ait Johannes Gerson." I will discuss Summenhart's account of the origin of property with related questions in chapter 4.

[167] *Opus septipartitum*, q. 2, sig. C2v: "Dicitur secundo non competens etc. in hoc differt a quattuor primis speciebus, ut patuit."

Summenhart maintains that the characteristic "retainable and alienable whenever charity is preserved or not preserved" explicitly differentiates civil dominion from the dominion of grace. He illustrates this difference with four conclusions. The first is that civil dominion is retainable when charity is not preserved. Summenhart remarks that "from the fact that someone commits a mortal sin, it does not necessarily follow that because of this he loses civil dominion of his things and possessions." Second, civil dominion is retainable when charity is preserved. Summenhart points out that "someone can follow Christ's law and consequently be in charity without alienating ownership (*proprietas*) and dominion, as we can clearly say of the secular clergy who have not renounced ownership by a vow." Third, the civil dominion is "also alienable with having charity, for one can renounce this *dominium* by retaining charity, and even merit from its abdication." Fourth, civil dominion is abdicable without having charity, since "one can renounce it by not having charity."[168]

Summenhart's point is to emphasize that civil dominion is independent of charity just as charity is independent of civil dominion. He confirms this idea in his final conclusion concerning the acquisition of civil dominion.

> And as it [i.e., civil dominion] is not destroyed when charity is destroyed, it is not acquired when charity is acquired, as if on account of the fact that someone is given charity, he already has the civil dominion of all things, as if charity made everything common in that way and no less than the extreme necessity.[169]

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[168] *Opus septipartitum*, q. 2, sig. C2v: "Dicitur tertio retinibile et abdicabile servata vel non servata charitate in hoc differt a dominio gratifico, quia illud non est retinibile non servata charitate, nec etiam abdicabile servata charitate, hoc autem dominium civile retineri potest perdita charitate. Nam ex hoc quod quis labitur in mortale, non oportet quod propter hoc perdat civile dominium rerum et possessionum suarum, ut patebit in q. vii. Similiter potest retineri servata charitate, quia simul stant in aliquo quod sit in charitate et habeat proprietatem et civile dominium rerum. Lex enim christi servari potest, et per consequens aliquis potest esse in charitate sine abdicatione proprietatis et dominii, ut patet in secularibus qui non abdicaverunt proprietatem a se per votum. Hoc etiam est abdicabile cum charitate, quia potest quis renunciare illi dominio salva charitate quam habet, immo merendo in eius abdicatione. Potest etiam eis renunciare non habendo charitatem."

[169] *Opus septipartitum*, q. 2, sig. C3r: "Et sicut non perditur perdita charitate, ita non acquiritur acquisita charitate quasi per hoc quod quis efficitur in charitate iam habeat civile dominium omnium rerum quasi charitas faciat omnia communia eo modo et non minus quam extrema necessitas…" On this point, Summenhart refers to the condemned articles of a certain Dionysius Parisius. Unfortunately, I have not been

Here, Summenhart is referring to the legal doctrine of the common possession of things in situations of extreme necessity, which had been developed in medieval canon law.[170] This doctrine recognized that the actual circumstances in which people live can temporarily affect the exclusive nature of civil dominion and even restore the common possession of things. In the case of charity, Summenhart explicitly denies this kind of causal effect. Charity does not make everything common, for there is no causal link between charity and civil dominion.

The final characteristic, "founded in civil and political laws," is associated with the concepts of foundation and law, which Summenhart regards as central to his analysis of dominion. The clause "founded in civil and political laws" was not included in the description of civil dominion in *De vita spirituali animae*, but Gerson made the addition when he repeated the description in *De potestate ecclesiastica*. From Summenhart's point of view, this was a significant addition. Summenhart's explanation is based on his view of the two functions of the law: the law defines the foundation of dominion and concedes dominion to the subject upon which the foundation is predicated. He explains that the characteristic "founded in civil and political laws" differentiates civil dominion from all other species of dominion. This is because civil dominion is appropriate to its subject according to the civil law, whereas other dominions are appropriate to their subjects according to other laws. He explains further that this characteristic should not be understood as signifying that civil laws were the actual foundation of civil *dominium*. The idea is rather that civil laws appoint something to be the foundation, for which reason civil dominion is to be conceded to someone. According to Summenhart, the reason this characterization is used in the description lies in the fact that civil dominion can be founded on several things, such as donation, purchase, exchange, and prescription. Therefore, the foundation of civil dominion "cannot be expressed with a single designation."[171]

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able to identify this author. Ibid.: "…hoc enim falsum est et damnatum in articulis cuiusdam Dionysii parisius."

[170] For this doctrine, see Swanson 1997, 403–430; Tierney 1989, 642–644.

[171] *Opus septipartitum*, q. 2, sig. C3r: "Dicitur quarto fundatum in legibus civilibus, in quo differt ab aliis quinque dominiis supra habitis, que secundum alias leges conveniebant suis subiectis, hoc autem convenit secundum civiles. Et in hoc tangitur fundamentum illius dominii non quod leges civiles sint fundamentum vel titulus illius dominii, immo ille leges sunt illa secundum que conceditur tale dominium alicui, sed fundamentum illius dominii est illud quod leges civiles disposuerunt esse titulum vel

3.2. *Natural dominion*

The classifications of dominion that Gerson introduced in his *De vita spirituali animae* and *De potestate ecclesiastica* represent different approaches to the question: By what reason can dominion be classified as natural dominion? In *De potestate ecclesiastica* the term "natural" appears as an attribute that qualifies the foundation of the dominion. The dominion that is founded on the title of a natural gift, is on account of its foundation, differentiated from supernatural dominions. Gerson did not, however, classify the dominion with a natural foundation as natural dominion.[172]

Natural dominion appeared as a species in Gerson's law-based classification of dominion in *De vita spirituali animae*, where it is described as "dominion according to natural law." In other words, natural law defined natural dominion.[173]

Still another approach to natural dominion can be found in the major theory in *De vita spirituale animae* in which Gerson classified man's dominion using the state of man's nature as the principle of division. In this approach the expression "natural dominion" seems to refer to man's metaphysical nature. When Gerson discussed the dominion characteristic of man's instituted nature, he called this natural dominion as well as original dominion. His view was that, in creating man, God gave man dominion over God's creation as well as an inner dominion of the will, which was the center of essential human freedom. Gerson also maintained that, although the Fall of Adam destroyed man's nature, it did not altogether destroy man's natural dominion.[174]

When Gerson introduced the six-member classification of dominion in *De potestate ecclesiastica*, he revised his theory in a significant way, as far as natural dominion was concerned. Instead of classifying dominion on account of man's nature, he used the concept of law as the classification principle. This change had the important consequence of eliminating the idea of man's natural dominion from the

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fundamentum gratia cuius alicui concedi debeat tale dominium, quemadmodum est donatio, emptio, permutatio, prescriptio etc. leges enim civiles disponunt quod qui dono receperit rem vel emerit vel prescripserit eam legitime, debeat habere dominium vel ius civile illius, fundamentum tamen illud non potest uno vocabulo designari."

[172] Gerson, *De potestate ecclesiastica*, consideratio 13, 253.

[173] Gerson, *De vita spirituali animae*, lectio 3, 28.

[174] Gerson, *De vita spirituali animae*, lectio 3, 28–29.

discussion. The issue of natural dominion did not arise at all in the context of the six-member classification.

In his commentary on the six-fold classification of dominion, Summenhart acts as if natural dominion were a part of that classification.[175] He also explicitly criticizes Gerson for omitting natural dominion from that classification. According to Summenhart, the six-fold nature of dominion did not enumerate all the species that fall to the share of man.

> For there is a natural *dominium*, namely, that which is founded on a natural gift and is appropriate to man according to natural law; certainly one should not leave out this species, for natural law concedes certain *dominia* as well as do canon or civil law.[176]

This short passage is highly informative. Summenhart treats natural dominion as a species that is fully comparable to the species identified in the six-member classification. Thus, for him natural dominion belongs to the same level of discussion as the dominion of grace, beatific, original, evangelical, canonical, and civil dominions. Summenhart brings the idea of man's natural dominion back into discussion, which reflects his effort to connect the six-member classification to the theoretical discussion of *De vita spirituali animae*. Summenhart does not, however, comprehend man's natural dominion in terms of man's metaphysical nature. Instead, he constructs the concept of natural dominion by making use of the concepts of foundation (founded on a natural gift) and law (according to natural law). He thereby manages to connect the foundation-based classification to the law-based classification, reconciling both with the six-member classification of dominion.

3.2.1. *Dominion founded on a natural gift*

According to Summenhart's description above, man's natural dominion is characterized by having a natural gift as its foundation. This characterization is a direct reference to the three-member classification, which categorized dominion according to distinctions that can be

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[175] See chapters 3.1.1. and 3.1.2. above.

[176] *Opus septipartitum*, q. 3, sig. C3r: "…quia aliquod est dominium naturale conveniens homini, quod scilicet fundatur in aliquo dono naturali secundum legem naturalem que species utique non debebat pretermitti, quia ita bene lex naturalis concedit alique dominia sicut lex canonica vel civilis."

made in regard to its foundation. Gerson introduced this classification in his *De potestate ecclesiastica*, but did not provide any explanation for its rationale. Summenhart instead reviews the classification with commentary in Question 4:

> A certain dominion is founded on the title of gratifying grace, another on the title of supernatural grace that is just given gratis, but is not gratifying. The third one [is founded] on the title of a purely natural gift, such as election or natural succession to a principate.[177]

To begin with, Summenhart simplifies the terminology. He suggests that the genitive construction, "the title of gratifying grace" (as well as "the title of a supernatural, non-gratifying grace" and "the title of a purely natural gift") should be read in the sense of an intransitive construction. What he means is an interpretation in which the concept of "title" becomes assimilated to the concept of "foundation." To say that a certain dominion is founded on the title of gratifying grace (or some other God-given gift) is to say that gratifying grace (or the gift) is the title on which the dominion is based. In this way, Summenhart's reading shifts is from the idea that dominion is based on a title to the idea that dominion is based on a God-given gift.[178]

Implicitly, this three-member division in fact contained two distinctions. First, it used the idea of grace as a supernatural gift given by God. As such, grace was distinct from purely natural gifts. The other distinction divided grace to *gratia gratificans* and *gratia gratis data*. But which of these is the fundamental distinction in the present context? Summenhart seems to be intrigued by this question, for he suggests that this three-member division can be reduced to a two-member division and a subdistinction. The basic division is between two kinds of God's grace: gratifying grace, which Summenhart explicitly identifies with divine charity, and gratuitously given grace. He explains that

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[177] *Opus septipartitum*, q. 4, sig. C3v: "Dominiorum quoddam fundatur in titulo gratie gratificantis, quoddam in titulo alicuius gratie supernaturalis, solum gratis date, non tamen gratificantis. Tertium in titulo alicuius doni pure naturalis sicut est electio vel naturalis successio in aliquem principatum."

[178] *Opus septipartitum*, q. 4, sig. C3v: "Prima suppositio. Cum dicitur in illo modo dividendi in titulo gratie gratificantis vel gratis date vel doni naturalis, debet illud dictum intelligi per constructionem intransitivam, ut sit sensus quoddam fundatur in gratia vel dono tali, quod donum vel que gratia est met ipse titulus, sicut sal dicitur creatura salis, id est, creatura que est sal. Sensus igitur illius divisionis est, quoddam dominium habet pro titulo vel fundamento gratiam gratum facientem, quoddam vero pro titulo gratiam aliquam tamen gratis data."

gratifying grace makes its possessor worthy of God. Thereby, it differs from gratuitously given grace, which is called grace only because it is unmerited and freely given by God.[179]

Although Summenhart thus recognizes that all dominion is founded on grace, he is not inclined to Fitzralph's interpretation of dominion based on grace. In Summenhart's view, not all dominion is founded on gratifying grace; in fact, only one species of dominion is: the species called the dominion of grace or charity.[180] All other dominions possessed by man can be taken to be founded on gratuitously given grace, by which Summenhart understands the non-saving gifts given by God gratuitously.

> I say that somebody can have these [gifts] without being worthy of God, and this is two-fold, because either this thing is not attainable and acquirable by nature, as is the grace of healing, that is, the power of removing diseases solely by command of the will without using natural remedies and restoring health… And this gratuitously given grace is called supernatural, that is, non-attainable by nature or human ways. But if the thing is attainable or acquirable by nature or human ways—and because we have even this from God who gives us everything gratuitously—it can also be called gratuitously given grace, the kind of grace that is the strength of a body, healthiness, good *habitus*, beauty, being a king's first-born son. These are certainly given by God, but are acquired and attained through natural ways.[181]

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[179] *Opus septipartitum*, q. 4, sig. C3v: 'Tertia suppositio ponitur ad reducendum hanc trimembrem divisionem ad bimembrem et hoc secundum bimembrem divisionem gratie, et eius subdivisionem talem. Quod gratia est duplex. Quedam est gratum faciens et illa est idem quod charitas, et dicitur duplici ratione gratia, quia gratum facit habentem ipsi deo. Secundo quia gratis datur id est non ex merito, saltem de condigno et de prima gratia gratum faciente loquendo. Sed prima ratio est sibi propria, quia sola ipsa charitas facit gratum deo. Secunda autem ratio etiam aliis donis convenit. Alia igitur est gratia, que non facit gratum deo, sed tamen dicitur gratia eo quod sit gratis data.'

[180] *Opus septipartitum*, q. 4, sig. C3v: "Et exemplum primi membri patuit in tertio membro primi modi dividendi."

[181] *Opus septipartitum*, q. 4, sig. C3v: "Has inquam aliquis habere potest sine hoc quod sit gratus deo, et illa est duplex, quia vel illa res non est per naturam attingibilis et acquisibilis, sicut est gratia sanitatum, id est potestas auferendi solo imperio voluntatis sine applicatione naturalium remediorum morbos et conferendi sanitates… Et talis gratia gratis data dicitur supernaturalis, id est non attingibilis per naturam vel humana via. Si autem illa res est per naturam vel human via attingibilis vel acquisibilis. Attamen ex quo etiam illam habemus a deo qui omnia nobis dedit gratis, etiam potest vocari grati gratis data, ut est robus corporis, sanitas, complexio bona, pulchritudo, esse filium primogenitum regis. Hec quippe a deo conferuntur, scilicet mediantibus naturalibus viis acquiruntur et attinguntur."

Hence, Summenhart divides gratuitously given grace into supernatural and natural God-given gifts. Thus, by 'natural' is primarily meant "not supernatural." This entails a broad view of what counts as a natural gift: it includes things that are "attainable or acquirable by nature or by human ways."[182]

Summenhart's broad interpretation of the natural gift is explained in the examples he introduces to shed light on the dominion that is founded on a purely natural gift. His first example is a father's dominion over his son, which is based on the natural gift of fatherhood; the second is the son's dominion over the things that his father has left him (based on the natural gift that the son is born of him). The third example is regal dominion, which is appropriate to a king's son because he is the firstborn son.[183] Summenhart's final example broadens the scope of the discussion, taking it from the area of man's dominion to the dominion possessed by creatures in general.

> The fourth example: the right of repelling against the corrupter of one's existence falls to every individual being on account of a natural gift, viz. on account of existence; from the very fact that God has communicated this gift, viz. existence to a being, this being has the right of resisting those who want to take the gift away. Similarly, on the same gift is founded to animals the right of taking alimentation for conserving their existence; in this way the wolf has the right and dominion to prey on other animals, and birds have the right to collect grain and seeds and the like for their sustenance; in this way they have right to nest in our gardens; because God gave them the potency to engender fledglings and nourish them, therefore he also gave them the right in the instruments

[182] He also notes that the term "natural" should not be taken in the physical sense, in which it is contrasted with free action. *Opus septipartitum*, q. 4, sig. C4v: "Et non accipitur hoc dominium naturale prout distinguitur a dono collato per agens liberum, quo modo agens naturale et liberum distinguuntur secundo phisicorum, sed prout dominium naturale distinguitur contra supernaturale dominium…"

[183] *Opus septipartitum*, q. 4, sig. C4r: "Primum exemplum de tertio membro ut dominium quod habet pater in filium convenit ei ratione eius quod est eum genuisse illum vel esse patrem eius, eum autem illum genuisse est quoddam donum naturale, in hoc igitur ut in titulo vel fundamento fundatur dominium patris in filium. Secundum exemplum. Dominium quod habet filius in bonis per patrem relictis convenit ei ratione illius quod est eum esse genitum ab illo, illum autem esse genitum ab eo est dominium naturale, in hoc igitur ut in titulo vel fundamento fundatur illud ius vel dominium filii. Tertium exemplum. Dominium regale alicui filio conveniens ratione illius quod est primo genitus regis fundatur in hoc quod est eum esse primogenitum quod est donum naturale."

> by means of which they can do it properly, and this dominion is founded on a natural gift communicated to them by God.[184]

This passage embodies Summenhart's view of natural rights and dominion in more than one sense. The first thing to be noted is his subjective interpretation of *ius naturale*. The idea that every creature is entitled and obliged by natural law to maintain its existence was an idea common to medieval theories on *ius naturale*. Summenhart formulates this idea in terms of the right of the individual. Every creature has a right to defend itself against external aggression. The passage also provides a link to Jean Gerson's writing in lection 3 of *De vita spirituali animae*, in which Gerson developed his concept of the general right of every creature to realize its natural faculties.[185] The point where Summenhart clearly departs from Gerson's language is also present in this passage. Unlike Gerson, Summenhart formulates his view by using the concept of "dominion," which he took to be equivalent to "right."

As Summenhart's examples above implied, man's natural dominion is not differentiated from all other dominions by the fact that it is founded on the natural gift. The point becomes clear when he shows how the six-member division of dominion is related to the three-part division to be discussed presently. He points out, as he noted before, that the dominion of grace is the same as the first part, that is, the dominion founded on gratifying grace. Further, the beatific, the

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[184] *Opus septipartitum*, q. 4, sig. C4r: "Quartum exemplum, ius repellendi corruptorem sue existentie convenit unicuique rei ratione naturalis doni, scilicet ratione existentie, eoipso enim quod deus alicui rei communicavit hoc donum scilicet existentiam habet talis res ius resistendi eis que ei illud donum auferre vellent. Similiter in eodem dono fundatur animalibus ius accipiendi alimenta quibus conservetur existentia, hoc modo lupus habet ius et dominium invadendi alia animalia, et aves habent ius colligendi grana vel semina et consimilia quibus sustentantur, hoc modo habent ius nidificandi in arboribus nostris, quia deus eis dedit potentiam generandi pullos et eos educandi, igitur etiam dedit eis ius in mediis quibus hoc commode facerent, et illud dominium fundatur in dono naturali eis communicato per deum."

[185] See Gerson, *De vita spirituali animae*, lectio 3, 26. See above chapter 1.7. Like Gerson, Summenhart did not apply this concept exclusively to sensible creatures. As described earlier, Summenhart maintains that the "heavenly bodies have the right of exercising various actions with respect to those underneath them, concerning motion, light and influence." Also, Summenhart recognized, that this right "is called dominion which is appropriate to them by reason of the natural gifts given (*communicatorum*) by God." *Opus septipartitum*, q. 6, sig. C6r: "Corpora enim celestia habent ius varias actiones exercendi in hec inferiora, motu, lumine, et influentia, quod eorum ius dicitur dominium conveniens eis ratione naturalium donorum, eis a deo communicatorum."

original, and the evangelical dominion fall under the second part, that is, dominion founded on *gratia gratis data*.[186] What is most significant, as far as natural dominion is concerned, is that canonical as well as civil dominion fall under the third part, that is, dominion founded on a purely natural gift. According to Summenhart, both canon and human dominion are "founded on such things which man has or can have by natural ways," as, for example, various human actions.[187] This means that man's natural dominion is not sufficiently identified by its foundation, but requires further elaboration, which Summenhart finds in the idea that natural dominion is appropriate to the subject according to natural law.

3.2.2. *Dominion according to natural law*

Summenhart's definition of man's natural dominion in terms of natural law receives its full explanation in Question 5, in which he discusses the third classification of dominion, which he had taken from Gerson's texts. The opening words define Summenhart's inquiry. He sets out to clarify

> …whether the third way of dividing dominion, which also has three parts, is posited well, in which [dominion] is divided as follows: One dominion is divine, another natural, and yet another human.[188]

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[186] *Opus septipartitum*, q. 4, sig. C4v: "Prima conclusio, membra primi modi dividendi possunt comprehendi sub tribus membris secundi modi dividendi probatur inductive. Nam dominium beatificum super beatitudine fundatur. Beatitudo autem est gratia gratis data supernaturalis, et non est charitas nec gratia gratum faciens, licet presupponat illam, et licet etiam sit actus charitatis, quia fruitio beatifica procedit partim ex charitate, saltem tenendo quod beatitudo est a deo, non tanquam a tota causa. Dominium autem originale comprehenditur sub secundo membro, quia fundatur in dono originalis iustitie, illud autem est gratia gratis data supernaturalis non gratum faciens. Insuper dominium gratificum est adequate idem cum primo membro huius secundi modi dividendi. Evangelicum autem dominium continetur sub secundo membro, quia fundatur in caractere ordinali, caracter autem est gratia gratis data supernaturalis."

[187] *Opus septipartitum*, q. 4, sig. C4v: "Dominium autem canonicum comprehenditur sub tertio membro, quia illa fundatur super illis que naturali via homo habet vel habere potest ut super actionibus per eum naturaliter factis vel circa eum factis naturaliter… et civile etiam super actionibus humanis fundatur ut super prescripsisse, emisse successisse et sic de aliis."

[188] *Opus septipartitum*, q. 5, sig. C5r: "Utrum tertius modus dividendi dominium existens etiam trimembris sit bene positus, quo sic dividitur. Dominiorum quoddam est divinum, quoddam naturale, et quoddam humanum."

Summenhart recognizes that it could be possible to take divine dominion (as intrinsic denomination) to mean the dominion possessed by God, human dominion to mean the dominion possessed by man, and natural dominion to mean dominion possessed by any natural being or corporal creature. This is not the way, however, that Summenhart reads this classification in the present context. He stresses that by divine dominion, we should mean (as extrinsic denomination) dominion that is appropriate to the subject according to the concession of God or divine law. By natural dominion is meant dominion that is appropriate to the subject by nature or by the concession of natural law. By the human dominion is meant dominion appropriate to the subject by the concession of man or human law. Thus, the classification embodies the idea that dominion is conceded by either God, man, or nature by means of law.[189]

As in the case of the foundation-based classification, Summenhart rewrites this three-member classification of divine, natural, and human dominion in a binary distinction:

> Every dominion is appropriate to someone according to some law; therefore, either according to an intrinsic law founded on natural reason, which is the law of reason, and this is the second member [i.e., natural dominion]. Or according to an extrinsic law, and this in two ways, because either according to divine law, and that is the first member [i.e., divine dominion], or according to human law, and that is the third member [i.e., human dominion].[190]

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[189] *Opus septipartitum*, q. 5, sig. C5r: "Prima suppositio. Dominium dici divinum potest intelligi dupliciter. Uno modo, quia ei cui convenit, convenit ex concessione dei vel legis divine, hoc modo dominia alique convenientia creaturis dicuntur dominia divina, et sic capitur in hoc modo dividendi. Alio modo, quia convenit deo, quo modo dicimus deum habere dominium divinum in creaturis, et sic non capitur hic. Unde primo modo captum dicitur denominatione extrinseca divinum. Secundo modo vero denominatione intrinseca. Secunda suppositio. Dominium dici humanum, eodem modo potest intelligi dupliciter. Uno modo, quia ei cui convenit ex concessione hominis vel legis humane convenit, quo modo civilia et canonica dominia dicunt humana, et sic capitur in hoc tertio modo dividendi… Tertia suppositio. Dominium dici naturale, etiam potest dupliciter intelligi. Uno modo, quia ei cui convenit, convenit ex natura vel concessione legis naturalis, ut dominium patris in filium, et hoc modo capitur hic."

[190] *Opus septipartitum*, q. 5, sig. C5r: "Omne dominium convenit alicui secundum aliquam legem, aut ergo secundum legem intrinsecam in naturali ratione fundatam que est lex rationis, et sic est secundum membrum. Aut secundum legem extrinsecam, et hoc dupliciter, quia vel secundum legem divinam, et sic est primum membrum, aut secundum legem humanam, et sic est tertium membrum."

Here, Summenhart's description of natural law is intriguing. The idea of natural law as an inner law of reason was a commonplace in medieval thought. However, Summenhart seems to elaborate deliberately on this idea by stating that natural law is founded on natural reason. This implies that natural reason is logically prior to the dictates of natural law. Thus, in natural law it is not a question of eternal principles that are accessible to reason, but rather of dictates that spring from natural reason. This concept of natural law is apt to broaden the scope of "natural dominion," because "reasonableness" becomes the primary criterion for natural dominion at the expense of any metaphysical considerations.

Summenhart does not explain or develop further the idea of natural law as intrinsic law founded on natural reason. Yet he puts the idea to use with interesting results. For one thing, he suggests that God's dominion over creation could be characterized as natural dominion. In medieval thought this was a unique interpretation:

> For right reason dictates that God should have the faculty of assuming created things according to his will, which is the primary justice, and which is the dictate of right reason. However, this is not to be understood so that God would be subject to a superior law that concedes him this dominion, but the natural law confirms this dominion, which is in God, and dictates that it should be appropriate to Him.[191]

Here, Summenhart combines Gerson's idea of dominion as the faculty to assume a thing according to the law into his own idea of dominion as conceded by the law. While Summenhart is careful to emphasize that natural law is not superior to God's will, his main point concerns the way that natural law concedes dominion to God. At its foundation natural reason recognizes that it is reasonable that God as the creator should have dominion over his creation, and in this sense natural reason concedes this dominion to God.

A similar interpretation of natural law in terms of natural reason or prudence emerges in some other chapters of *Opus septipartitum*. This interpretation specifically characterizes Summenhart's discussion of the justification of private property, which will be dealt with in the

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[191] *Opus septipartitum*, q. 5, sig. C5r: "Recta enim ratio dictat quod deus debeat habere facultatem assumendi res creatas secundum suam volitionem que est prima iusticia, et que est dictamen recte rationis. Non tamen sic intelligendo quod deus alicui legi superiori subsit sibi concedente illud dominium, sed illud inexistens sibi dominium lex nature approbat et dictat sibi debere convenire."

next chapter. It also appears in Question 4, in a section that clarifies the father's dominion over his offspring, understood as *ius patrie potestatis*. Summenhart refers to the Roman legal status *ius patrie potestatis* and points out that it can be understood in two ways. For the Romans, *ius patrie potestatis* was a civil right that defined the juridical relationship between father and son. In another sense, *ius patrie potestatis* means the right to "demand something from the son to which the son is obliged by the natural dictates of reason." Summenhart stresses that in this sense, *ius patrie potestatis* is a universal phenomenon; it belongs to all fathers, to Franks as well as to Romans.[192]

As an ultimate demonstration of the universal nature of a father's natural dominion, Summenhart refers to the primal state of man. He points out that if Adam had had offspring in a state of innocence, then his dominion over them would have been congruent with the pristine equality that was to reside among those in Paradise. On this point, Summenhart refers to the Franciscan Alexander of Hales, and to his distinction between two kinds of dominion: prelatical and possessive. The difference can be described by means of the corresponding obligations. Prelatical dominion gives rise to an obligation that Alexander characterized as "an obsequiousness and servitude of reverence," whereas the obligation related to possessive dominion is characterized by "an obsequiousness and servitude of necessity."[193] According to Summenhart, this distinction sheds light on the nature of the father's natural dominion in Paradise:

> It is said that taking dominion in the first sense [i.e., as prelatical dominion], Adam would have come to dominate other human beings and they would have come to serve him. For it is reasonable in every respect that, if they had come into being, his sons would have been obedient to him in honoring and showing respect and obedience for material things,

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[192] *Opus septipartitum*, q. 5, sig. C4r: "Dicendum, ius patrie potestatis capitur dupliciter. Uno modo pro iure ad exigendum aliqua a filio ad que ex naturali dictamine rationis filius tenetur patri, et hoc modo minor est falsa, nec illud convenit solum romanis, nec francigene carent illo iure. Alio modo prout illud ius consistit in quibusdam positivis effectibus quos humana constitutio voluit servari inter patrem et filium quos tamen illud ius seclusa humana constitutione non importaret."

[193] *Opus septipartitum*, q. 2, sig. C4v: "Sed primo modo capiendo est de iure naturali. Unde etiam in statu innocentie habuisset pater ius patrie potestatis primo modo in filium. Unde Alexander in secunda parte, q. xxix, membro primo ditinguendo post Augustinus, Genesis xi, ad litteram duplex dominium, scilicet prelationis, cui correspondet obsequium et servitus reverentie, et dominium possessionis, cui correspondet obsequium et servitus necessitatis."

> such as if he wanted to eat, they would have brought him fruits and performed other similar services.[194]

By treating the father's dominion as a prelatic dominion that is different in kind from possessive dominion, Summenhart upholds the common idea that the original state of man was free of relationships that put men to unequal positions in relation both to each other and also to the things of this world. Yet the most significant point in his reasoning is the way he ignores metaphysical considerations and focuses on analyzing the situation by natural reason. If Adam had had children in a state of innocence, then he would have had a father's dominion because that is reasonable. It would have been just as reasonable as it is now that the father has dominion over his children who, reciprocally, have corresponding obligations to their father.

[194] *Opus septipartitum*, q. 2, sig. C4v: "Dicitur quod primo modo capiendo dominium Adam fuisset dominatus aliis hominibus et illi servi eius. Omni enim rationi consonum est quod si stetisset, filii eius obsequiosi fuissent ei in exhibitione honoris et reverentie et obsequiis corporalibus, ut si vellet comedere, in allatione fructuum et consimilibus obsequiis, hec ille."

CHAPTER FOUR

PROPERTY RIGHTS

In *Opus septipartitum* Summenhart sets out to review economic contracts in a theological forum or court of conscience (*pro foro conscientie atque theologico*). His theory of individual rights also carries a theological emphasis. The concept of an individual right depicted the right-holder as a moral agent in a framework in which any right ultimately derives from God. In the theory of the species of dominion, individual species are viewed from a distinctively religious or theological perspective. The moral analysis, which is the primary subject matter in *Opus septipartitum*, is also meant to be juridically valid. The economic contractual transactions that Summenhart analyzes are defined by positive human legislation. As a response to this contextual aspect, the third part of Summenhart's theory of rights consists of discussion that adjusts his theological theory to this juridical framework.

Primarily, Summenhart connects the realm of private property to his theory through a detailed exposition of the four property titles generally recognized in medieval jurisprudence: the right of use or *usus*, usufruct (*usufructus*), ownership (*proprietas*), and possession (*possessio*). In Questions 12 through 14, Summenhart gives these juridical titles an interpretation that, on the one hand, is plausible within the juridical discourse, but on the other hand reflects his own concept of individual rights. Summenhart's guide to juridical terminology is the Italian Dominican Antoninus of Florence (1389–1459) and his *Summa theologica* written c. 1458. While Summenhart does not make explicit his dependence on Antoninus's *Summa*, his extensive use of the chapter *De dominis temporalibus* in Antoninus's work leaves no doubt as to his source. Summenhart uses Antoninus's exposition as a disposition, on which to build his own discussion. Occasionally, Summenhart quotes passages from Antoninus directly and sometimes reaches different conclusions than Antoninus. In some parts, Summenhart's discussion is based on his own theory of rights and exceeds the source text in length and in detail.[1]

[1] For Antoninus's discussion of the four property titles, see Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F2v.

In Antoninus's *Summa* the discussion of the four property titles was preceded by a discussion of the justification of private property. Summenhart does the same in Questions 8 through 11. What is common to both writers is the conviction that before a moral theorist can discuss property rights, it is appropriate to show that private property can be considered a licit arrangement. While Antoninus's discussion is a concise survey (in which he precisely follows the exposition of the Franciscan John de Ripa), Summenhart provides a detailed inquiry that reflects his own theory of the species of dominion. Although Antoninus's text provides structure for his discussion, Summenhart develops new lines of argument and explicates his own concept of natural law-based justification of private property.[2]

4.1. *Justification of private property*

Summenhart begins his discussion in Question 8 by asking "whether dominions of things were ever undivided (*indistincta*)?" Summenhart clarifies this question by pointing out that the notion of "undivided dominion" does not mean that there is a single dominion possessed equally by all men. He refutes this interpretation of the community of all by pointing out that dominion is an accident (a relative accident), and an accident that exists in one subject is never the same as an accident existing in another subject. This argument is technical, but it conveniently shows that Summenhart thinks of dominion in individualistic terms. According to him, the notion of "undivided dominion" means that "if one has dominion of a thing, then everyone else also has dominion of the same thing."[3] In this sense, his inquiry addresses

[2] For Antoninus's discussion of the origin of property, see Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F2r.

[3] *Opus septipartitum*, q. 8, sig. D4v: "Utrum rerum dominia fuerint aliquando indistincta. Solutio questionis stat in tribus suppositionibus et quinque conclusionibus. Prima suppositio. Titulus questionis, scilicet dominia rerum aliquando fuisse indistincta potest intelligi dupliciter. Uno modo quod fuerint intrinsece indistincta, et hoc modo ea fuisse indistincta esse ea sic se habuisse quod illud dominium quod unus habuisset fuisset illud idem dominium quod alii habuissent, et hoc modo nunquam dominia rerum fuerunt indistincta, quia nunquam accidens existens in uno subiecto est idem cum accidente quod est in alio subiecto. Modo dominium quod habet unus est accidens saltem respectivum, ergo illud non erit idem cum dominio existenti in alio subiecto, scilicet distinguitur numero sicut et subiecta. Alio modo quod fuerint indistincta extrinsece, et sic dominia aliquando fuisse indistincta est ea sic se habuisse,

whether the things of this world "were once common to all men and unappropriated."[4]

Summenhart first remarks that the question concerning undivided dominions implies a multiple inquiry, because there is not just one dominion, but many. This is a direct reference to his theory of the species of dominion, and his suggestion is that the question should be asked and answered separately with respect to each species. He also recognizes that the question at hand includes a historical perspective (which is signified by the term "ever"). According to him, the time in which men have dominion of things has two periods, the time of integral nature and the time of corrupted nature. Consequently, the question about the indivisibility of dominions has to be answered in light of this distinction.[5]

Summenhart maintains that in the time of integral nature, all man's dominions were undivided; dominions were either natural or divine (original), and all of these were dominions without division or appropriation.[6] In the time of corrupted nature, the dominion of things was divided by the introduction of civil dominion. Summenhart says that civil dominion has never been undivided. However, the fundamental point is that the appropriation of things under civil dominion did not affect natural or divine dominions:

> Yet these are undivided even today in the state of corrupted nature, although on top of these men's divine and natural dominions has been added civil dominions, which are divided. However, this division does not remove the indivisibility of the previous dominions, but such remain in their pristine indivision, so that according to them, there was no

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quod illius eiusdem rei cuius unus habebat dominium, etiam reliqui omnis habebant dominium. Et hoc modo capitur in titulo questionis."

[4] *Opus septipartitum*, q. 8, sig. D4v: "Sensus ergo est, utrum res quarum homines habent dominia, aliquando fuerint communes omnibus et inappropriate." The term *distincta dominia* derives from Roman law (Dig. 1.1.5). In medieval discourse the origin of private property was often discussed using the terminological pair *distincta/indistincta dominia*. It was also used in Antoninus of Florence's *Summa*, from which Summenhart has taken the model for his inquiry.

[5] *Opus septipartitum*, q. 8, sig. D4v: "Tertia suppositio est propter illum terminum positum in titulo, scilicet aliquando. Et est, quod duplex est tempus in quo homines habuerunt aliqua dominia, scilicet tempus nature integre, et tempus nature corrupte."

[6] *Opus septipartitum*, q. 8, sig. D5r: "Quarta conclusio. Tempore nature humane integre, dominia fuerunt indistincta. Probatur, quia tunc nulla fuerunt in homine dominia civilia, sed tamen divinum naturale et originale, modo originale fuit sine distinctione et proprietate, ut patuit in secunda questione, similiter naturale et divinum…"

> division in things, but that when the one is *dominus* of a thing, also the other is *dominus* of the same thing.[7]

Summenhart explains that even though the dominions of things were once undivided and now are divided, this should not be understood as the same kind of dominion. A distinct civil *dominium* is placed over man's natural dominion, which remains indistinct under civil *dominium*. Summenhart also maintains that evangelical dominion and the dominion of grace are and have always been undivided in their nature.[8] This model of two orders or two levels of dominions is strained at the very least and serves to initiate Summenhart's discussion of other questions that follow. What is clear is that civil *dominium* seems to conflict with the natural order of things; if things of this world are common to all under natural *dominium*, even today, then how can it be morally justifiable to appropriate things under civil *dominium*?

4.1.2. *The expediency of private property*

Summenhart presents his justification for the institution of private property in three successive Questions (9–11). In Question 9 he inquires whether things that were common to all men in the state of innocence could later be divided licitly and reasonably among men, so that "this thing was proper to that person, and that to another."[9] In answering this question, Summenhart introduces a principle of interpretation

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[7] *Opus septipartitum*, q. 8, sig. D4v: "…ad huc etiam hodie in statu nature corrupte illa sunt indistincta licet illis dominiis divinis et naturalibus existentibus in hominibus superaddita sint dominia civilia que distincta sunt, tamen illa distinctio non tollit indistinctionem dominiorum predictorum, quin talia manserint in sua pristina indistinctione, ita quod secundum ea non esset distinctio in rebus quin eiusdem rei cuius unus est dominus etiam reliquus est dominus."

[8] *Opus septipartitum*, q. 8, sig. D5r: "Correlarium. Cum igitur dicitur quod dominia rerum fuerunt olim indistincta et iam sint distincta, non est intelligendum hoc loco loquendo de dominiis eodem modo captis, quia ille eadem que olim fuerunt indistincta, si hodie sunt, etiam hodie sunt indistincta, ut patet de beatifico et gratifico, et sic de aliis, sed debet intelligi de dominiis diversis in specie, eiusdem tamen in ratione generica dominii, quia scilicet cum ut olim nulla erant dominia rerum civilia existentia cum appropriatione, postea ceperunt humana ordinatione ordinari civilia dominia existentia cum appropriatione."

[9] *Opus septipartitum*, q. 9, sig. D5r: "Utrum cum rerum dominia primum fuerint indistincta et communia, ipsa potuerint postea licite et rationabiliter distingui seu appropriari… Est ergo sensus questionis, utrum cum res (quarum homines habent dominia) primum fuerint communes hominibus, sic quod nulli fuerant appropriate, ipse potuerint postea licite et rationabiliter aliquibus appropriari, ut hec esset propria illi, illa alteri, et sub talibus terminis ponentur etiam conclusiones."

that depends on the notion of expediency. According to him, what is expedient (*expediens*) and suggested by reasonable causes can take place licitly and reasonably.[10] This principle defines the justification of private property in terms of the favorable consequences of private appropriation. Summenhart takes "expedient" to connote "licit." He explains this with a biblical notion, saying that "expedient" presupposes "licit" "as less common presupposes more common, yet not the reverse; this is what Apostle meant when he said: 'all things are licit to me, but all things are not expedient.'" (1. Cor. 10:23)[11] This reasoning suggests that we can relegate the licit quality of private property as an independent question to the background and concentrate on the expediency of property. If the institution of private property is shown to be expedient, then it will also be licit. Although Summenhart has not yet made clear what he means by "expedient," it is apparent that the term carries a strong consequentialist emphasis and refers to the general notion of "good." Thus, he seems to be promoting an approach in which moral obligation (or "right") is defined in terms of the good. However, as we will find out later, Summenhart's discussion does not totally assimilate "right" into the "good," but he will return to the question of the licitness of private property later.

Why was it expedient to divide things among men and establish the institution of private ownership and property rights? According to Summenhart, this was because the opposite practice of leaving the earth unappropriated would not have been expedient after the Fall.[12] Summenhart took this conclusion directly from Antoninus's *Summa*, and the following account, which is there to prove the validity of this

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[10] *Opus septipartitum*, q. 9, sig. D5r: "Prima conclusio est affirmativa ad questionem, quod sic, hoc est, quod cum res primum, scilicet in statu innocentie fuissent communes et non appropriate potuerunt postea licite et rationabiliter appropriari. Probatur sic. Illud quod erat expediens atque ad quod movebant cause rationabiles, potuit licite et rationabiliter fieri, sed quod res primum communes postea appropriarentur, erat expediens et rationabiles cause ad hoc movebant, igitur conclusio vera."

[11] *Opus septipartitum*, q. 9, sig. D5r: "Maior quo ad primam partem nota, quia expediens presupponit licitum, sicut minus commune magis commune, licet non econtra, ut vult Apostolus dicens. Omnia mihi licent, sed non omnia expediunt."

[12] *Opus septipartitum*, q. 9, sig. D5r: "Minor quo ad primam partem probatur, quia vel ipsum fuit expediens vel suum contradictorium, quia de quolibet affirmatio vel negatio vera, de nullo ambo simul, sed suum contradictorium non fuit expediens scilicet quod cum primum res essent communes, scilicet in statu innocentie quod postea in statu nature lapse non appropriarentur, ita quod adhuc manerent communes, ut probabitur in sequenti conclusione, igitur eas appropriare fuit expediens."

conclusion, is also heavily indebted to the same source.[13] Summenhart says that the validity of the conclusion can be proved in two ways: by authority as well as by reason. The authority here is Aristotle who, in the second book of *Politics*, criticized Plato's ideal community, which was characterized by the community of all. Summenhart concludes that Aristotle was speaking of circumstances after the Fall, since he spoke of the time of mankind. As proof based on reason, Summenhart refers to four inconvenient and bad consequences, which—according to him—would have resulted if the things of this world had been common to all after the Fall.[14]

> First, the earth would have remained uncultured and become a desert. Second, the path would be open to fraud and malice. Third, the good [people] would always have less and the bad, more. Fourth, there would never be peace among mankind.[15]

Why would the earth have remained uncultured and become a desert? After the Fall, the earth did not produce fruits without manual labor as was the case in Paradise.[16] As the amount of production was dependent

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[13] See Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F2r.

[14] *Opus septipartitum*, q. 9, sig. D5v: "Secunda conclusio. Non expedivisset omnibus omnia esse communia pro statu nature lapse. Probatur dupliciter, scilicet autoritate et ratione. Autoritate Arestotelis qui in secundo politice improbat policiam Socratis ex eo quod posuit optimam esse illam policiam in qua sunt omnia communia, volens quod non expedit reipublice hominum quod omnia essent in ea communia prout ibi deducitur. Modo Arestoteles loquitur de hominibus pro statu nature lapse, quia loquitur de illis pro illo statu in quo invenit genus humanum… Secundo probatur ratione tali, in qua tanguntur aliqualiter aliqua que etiam ibidem tangit Arestoteles, et est. Illud non expedivisset pro statu nature lapse ad quod consecuta fuissent illa quattuor damna seu incommoda atque mala."

[15] *Opus septipartitum*, q. 9, sig. D5v: "Primum quod terre mansissent inculte, et fuissent redacte in solitudinem. Secundum, quod via fuisset aperta fraudibus et maliciis. Tertium, quod boni semper habuissent peius, et mali melius. Quartum, quod nunquam fuisset pax habita inter homines."

[16] *Opus septipartitum*, q. 9, sig. D6r: "…quia propter peccatum hominis Deus eiecit hominem de paradiso ad terram ad extra, et imposuit sibi ut de cultura terre viveret, dicens. In sudore vultus tui vesceris pane tuo etc., atque maledixit terre, adeo ut non solum non producat sine cultura, sed etiam culta producit multa contra intentionem colentis, Genesis tertio." In Paradise everything was different. Summenhart suggests that Adam did not have to work for his sustenance; God was the one who worked and took care of everything. Or if it was Adam who worked, then the work in Paradise did not strain him, but took place for the sake of experience and for exercising his will: "Posuit eum in paradisum ut operaretur et custodiret illum, sensus est, ut Deus operaretur hominem suis beneficiis ipsum perficiendo, ita quod suppositum illius verbi operaretur et custodiret esset deus. Vel etiam si Adam sit suppositum illius verbi operaretur, tunc operari capitur non per opere laborioso sed pro solatioso ad experientiam et exercitium sue voluntatis." *Opus septipartitum*, q. 9, sig. D6r.

on the amount of work, the division of labor and the distribution of its products became an issue. Summenhart says that if everything was to remain common to all, no one person alone would want to give his contribution to cultivation, but all would want to have their share of the fruits of labor. Further, he adds that through our own experience, we know that no one cares for common things, or at least cares very little for them.[17]

Why would the community of things open a path to fraud and malice? Summenhart observes that, if the production of the earth was common to all, then there would be no grounds for punishing the wicked and the twisted, who take more than their just share of the production. In that sense, justice would become an empty legal principle, for the wicked could always defend their actions by claiming that they were just taking their share. This would lead to the further consequence that "good people would always have less and the bad, more." This would be the case, because the good, who follow the judgment of right reason, would never take more than their share, whereas the bad would always take excessively. Finally, this situation would result in inequality, which, according to Summenhart, breeds quarrels and disrupts the peace. He also recognizes that the community of things is the potential origin for conflicts of use: for example, when several men want to use the same horse or house, to which they have an equal right.[18] Summenhart points out that in Paradise, these conflicts of use

[17] *Opus septipartitum*, q. 9, sig. D5v: "De primo patet etiam, quia terra pro statu nature lapse debebat coli ut in eius fructibus viveret homo atque debebat inhabitare per homines, et per consequens non maneret inculta et solitaria…et tunc cum fructus etiam deberent esse communes, eo quod omnes res essent communes, nullus inveniretur qui vellet solus subire laborem culture, et tamen omnes vellent habere participationes in fructibus laboris. Secundo idem patet per experientia. Videmus enim nunc quod de communibus nullus curat vel modicum valde, adeo quod talia permittuntur potius perire quam quod conserventur, iuxta proverbium. Quod communitatis est negligitur."

[18] *Opus septipartitum*, q. 9, sig. D5v: "Secundum etiam fuisset secutum, quia fortiores occupassent de illis communibus plus quam debuissent nec eis debiliores restitisse potuissent. Nam illud etiam videmus nunc fieri quantumcumque res sunt appropriate, multo magis manente communitate rerum, quia dixissent tunc se iuste illud facere posse, cum res essent non minus eorum quam aliorum, nec maliciosi et astuti potuissent puniti fuisse, quia allegassent omnia esse communia. Tertium etiam fuisset secutum, buia boni sequentes rectum iudicium rationis noluissent accipere plus debito, sed tamen necessaria, mali vero ex malicia multa superflua et meliora ex omnibus accepissent relinquentes viliora bonis. Quartum etiam fuisset secutum quia inequalitas inter homines nata est inducere litigia et turbare pacem, sicut hodie videmus quod hi qui plus habent, odio habentur a minus habentibus atque violentias patiuntur. Modo

would never have led to quarrels, because "everyone would freely make way for another according to what right reason dictated."[19] According to him, it would still be possible to follow right reason with the help of grace, but the fact is that most of mankind is apt to follow the *fomes* of sin rather than right reason.[20]

Summenhart's task was to prove that the institution of private property was established both licitly and reasonably. In his view, the expediency of private property was to demonstrate that private appropriation was established licitly. A similar consequentialist emphasis characterizes his interpretation of the criterion "reasonably." Summenhart states that it would not have been reasonable to continue with that kind of arrangement from which many bad and harmful things would have resulted. Thus, the causes for the move to the institution of private property can be summarized as "avoiding these four bad things, which would have assaulted and emerged from the human community if things had continued to be held in common."[21] Summenhart admits that private property was not a perfect solution to the problem, for the above-mentioned harmful things were not entirely avoided. Yet he stresses that when something is done to a particular end, that action should not be labeled "not rational" if men do not achieve this end perfectly. To be reasonable, according to him, it is sufficient that men achieve this end by a chosen course of action more completely than by the opposite course.[22]

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tunc fuisse inequalitas, ut patuit in secundo et tertio incommodo, igitur. Secundo, quia contingeret sepe in eadem republica quod plures vellent uti uno equo vel domo et cum quilibet diceret se habere ius equale iuri alterius, nullus vellet cedere usui pro tunc, igitur fierent litigia."

[19] *Opus septipartitum*, q. 9, sig. D6r: "Item cum plures voluissent uti una re, non fuisset ex hoc orta lis, quia unus libere cessisset alteri secundum quod recta ratio dictasset."

[20] *Opus septipartitum*, q. 9, sig. D6r: "… in statu autem nature corrupte habent pronitatem ex fomite provenintem ad declinandum a recta ratione, et plures sunt qui de facto sequuntur fomitem potius quam rectam rationem (licet possibile esset eis cum audiutorio gratie sequi rectam rationem) ideo non apud omnes vitata fuissent predicta incommoda, et ideo non omnibus etiam expedivisset communitas omnium rerum."

[21] *Opus septipartitum*, q. 9, sig. D5v: "Tertia conclusio. Sicut iam ostensum est quod non fuisset expediens sicut nunc. Dicendum quod neque fuisset rationabile quod omnes res mansissent communes. Probatur. Illud non fuisset rationabile permanere ad quod sequuntur multa damna et incommoda, sed res permansisse communes fuisset huiusmodi, ut deduxit precedens conclusio, igitur."

[22] *Opus septipartitum*, q. 9, sig. E1r: "Dicendum quod factum propter aliquem finem non debet ob hoc dici non rationabiliter factum si non attingant homines finem illum omnino perfecte absque omni imperfectione, sufficit enim quod illum finem homines attingant meliori modo per illud factum quam per eius oppositum, sic est hic."

In following Antoninus, Summenhart he uses the term "expedient" to refer to the public and common good (or lack of evil). However, he also defines the expediency of private property from the standpoint of the individual member of the human community. Summenhart points out that the conclusion that the community of all is not expedient in the state of fallen nature should not be understood to mean that the community of things is not expedient to anyone after the Fall.[23] The original kind of community is expedient for those individuals who enter religious orders, for the religious state is different from the state of sin; it is more like the state of innocence, which is the most perfect state in man's terrestrial pilgrimage.[24] At the same time, Summenhart maintains that private property can be expedient for some individuals.

> If a person is such that when he does not have things of his own, he would either totally languish in impatience or the impatience that pulls him away from loving eternal things would be greater than his love of having things of his own, then it would be better for him to keep his necessary commodities, and more perfect than to give them up and incur that impatience, because this way it would be easier for him to achieve some degree of sanctity and perfection, as Henry of Ghent reasons in his Quodlibet VII… If, however, he could renounce them without impatience or have impatience that is less blameworthy than the love of keeping things, then it would be better for him to abandon things of his own.[25]

Here, Summenhart evaluates "expediency" with respect to the end of the individual human being, which he defines in terms of human sanctity and perfection. In his view, the conclusion of the expediency of private property is thus confirmed. To summarize his discussion, Summenhart says that the community of things is expedient to some

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[23] *Opus septipartitum*, q. 9, sig. E1r: "Dicendum quod conclusio non dixit quod non aliquibus expediret omnia esse communia seu quod nullis expediret omnia esse communia in statu nature lapse…"

[24] *Opus septipartitum*, q. 9, sig. E1v: "Nam status religiosorum quo ad hoc quod est sine appropriatione rerum est similior statui innocentie qui est perfectissimus status vie…"

[25] *Opus septipartitum*, q. 9, sig. E1r: "Nam si quis est talis quod in non habendo propria aut omnino frangeretur impatientia, aut maior esset impatientia in retrahendo eum ab amore eternorum quam amor in possidendo propria, melius esset illi victui necessaria retinere et perfectius quam abdicare, et sic incurrere predictam impatientiam, quia facilius esset ei aliquem gradum sanctitatis aut perfectionis attingere, prout deducit Heinricus Gandensis quodlibeto VII… Si vero posset eis carere absque impatientia aut cum impatientia minoris culpe quam esset amor in retinendo, sic melius esset propria dimittere…"

and not expedient to others. "Therefore, the conclusion, that it would not be expedient that to all men all things were common is true."[26]

Although Summenhart defends the expediency of private property after the Fall, he nevertheless maintains that, absolutely speaking, the community of things is a better arrangement than private property.

> Absolutely speaking it would be better for men to live off the common [property] than to live off one's own. This is proved: because when we are to judge whether something is *simpliciter* better, we will have to look whether it is better for things that are in accordance with their nature and optimal disposition, and if so, then it is to be said that this is better *simpliciter* than that which is better for things that are not in accordance with their nature and optimal disposition.[27]

This is one of the key passages for understanding the rationale for Summenhart's lengthy discussion. In order to clarify his view further, Summenhart quotes Aristotle's example from the fourth book of *Metaphysics*. If many men of bad disposition declare that honey is bitter and a few men of proper disposition declare that it is sweet, it should thereby be accepted that honey is sweet and not bitter. This is because what is better with respect to those who are of a better disposition is simply better. This is true, although it would not be better for the majority.[28]

In summary, we may conclude that Summenhart evaluates the preference for private property versus the community of all on three levels: that of the human community or *respublica*, the individuals (where the majority aspect is relevant), and the human being or man as a species. His conclusion is that private property is better for the

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[26] *Opus septipartitum*, q. 9, sig. E1v: "Solutio patet, quia aliquibus est expediens, aliquibus non, ideo vera est conclusio quod non expediret quod omnibus omnia essent communia."

[27] *Opus septipartitum*, q. 9, sig. E1v: "Simpliciter loquendo melius esset homines vivere de communi quam eos vivere de proprio. Probatur, quia quando debemus iudicare an aliquid sit melius simpliciter, videndum est an illud esset melius rebus habentibus se secundum naturam et optimam dispositionem, et si sic, dicendum est quod sit simpliciter melius quam illud quod tamen est melius rebus non habentibus se secundum naturam seu in optima dispositione."

[28] *Opus septipartitum*, q. 9, sig. E2r: "Maior est Arestotelis primo politice, et dat exemplum in quarto Metaphisice, scilicet si plures homines male dispositi iudicarent mel esse amarum, pauciores vero dispositi iudicarent ipsum esse dulce, iudicandum est simpliciter quod mel est dulce et non amarum. Semper enim quod est melius vel aliquale tale respectu eius quod est bene vel melius dispositum sub aliqua specie, hoc est simpliciter melius respectu illius speciei, quamquam non esse melius pluribus eiusdem speciei male dispositis." See Aristotle, *Metaphysics*, IV, 5 (1009b).

respublica and the majority of individuals, while for the human being, the community of things is better than private property. This two-fold conclusion explains—at least in part—why Summenhart bases his discussion on the notion of expediency, for expediency speaks primarily of instrumental value rather than directly of the inherent value of things. Private property is expedient and reasonable, and it is therefore justified, although a community of all is better, absolutely speaking.

4.1.3. *Private property and natural law*

Summenhart first put the question of the legality of appropriating things in the background and concentrated on the expediency of private property. During the course of Question 9, this position is reversed, and in Questions 10 and 11, the emphasis of the inquiry is placed on the licit quality of private property. This change is effected for by a counter-argument that Summenhart introduces to challenge his own position. The argument claims that the appropriation of things could not have taken place licitly and reasonably because such a practice was against natural law. The law of nature, which obliges in every state, orders that all things should be common to all men.[29] The principle of the community of things under *ius naturale* was a commonplace in medieval legal thought. Explicitly documented in the text of *Decretum*, it was also echoed in many ancient texts of both pagan and Judaeo-Christian origin.[30] It also presented a theoretical challenge

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[29] *Opus septipartitum*, q. 9, sig. D6r: "Primo arguitur contra primam conclusionem. Id quod fuit factum contra legem naturalem, non potuit licite nec rationabiliter fieri, sed appropriatio rerum facta est contra legem naturalem, igitur non potuit fieri licite nec rationabiliter. Maior nota, quia lex nature in omni statu ligat et tamen ad rationabilia, et per consequens contradictoria eorum ad que ligat sunt licita et rationabilia. Minor probatur, quia lex nature disponit omnia esse communia omnibus, ut patebit questione sequenti."

[30] Summenhart reviews this principle in Question 10: "Huic conclusioni concordat Gratianus in decretis distin. VIII, capitulo primo dicens. Iure nature sunt omnia communia, et secundum hoc ius vel legem naturalem apostoli possederunt res temporales scilicet ut omnibus omnia que haberent essent communia. Etiam Plato sensit secundum hanc legem naturalem res esse possidendas, ut omnes res omnibus essent communes. Unde apud eum illa civitas iustissime ordinata traditur, in qua quisque proprios nescit affectus, ita quod quisque tantum alium diligit quantum se. Finxit enim Plato quandam rempublicam in qua omnia sunt communia. Tertio, quia Clemens in epistola, IIII et habetur, XII, questione prima capitulo, dilectissimis, ait communis usus etc.…" *Opus septipartitum*, q. 10, sig. E2v. Summenhart's first reference (to Gratian's *Decretum*, D.1 C.7) was taken by medieval theorists as the standard formulation of the idea. The text was originally composed by Isidore of Seville (d. 636) in his *Etymologiae*, Liber V, IV.

to medieval theorists when they needed to provide moral justification for the institution of private property. Summenhart's account marks the starting point for his discussion of the relationship between natural law and private property.[31]

From the earlier tradition Summenhart takes up two authors and their solutions to the challenge that all things should be common to all men according to natural law. Both of these were Franciscan: John Duns Scotus and Alexander of Hales. As one solution, Summenhart remarks that the argument could be answered, following John Duns Scotus, by insisting that the particular command of natural law that concerned the community of things was revoked after the Fall.[32] This meant that private property could be instituted without violating the dictates of natural law. Summenhart does not, however, accept this solution. He maintains that Scotus's solution is mistaken because it contradicts the text of the *Decretum* (D. 4 c. 3), which emphasizes the immutable (*immutabilis*) nature of natural law. He points out that

[31] The medieval theorists were not unanimous in their consideration of the obligative force of the principle of *ius naturale*. Could it be that private property is both expedient to the human community and at the same time morally wrong or illicit? And is it morally wrong because natural law is against private appropriation? The more the medieval theorist was inclined to define "right" in terms of "good," the less this question seemed relevant. For example, Thomas Aquinas stated that the common possession of all is in accordance with the right of nature in the same sense as being naked, by which he suggested that the right of nature does not set a norm at all as far as property arrangements are concerned. John Duns Scotus held a different view. For him, the obligation presented by *ius naturale* in the case of property was a more genuine one. His solution was that the sanction concerning the community of all was revoked after the Fall. Scotus's solution did not become popular, but it was adopted by a few Fransiscans, for example, John of Bassolis and Astesanus. See Langholm 1992, 419, 451. Summenhart refers to Scotus's view and, like most theologians, refutes it. A point of some interest is that Gabriel Biel, who was Summenhart's colleague in Tübingen, followed Scotus on this point, practically quoting Scotus's discussion of the issue. Summenhart does not, however, make any reference to Biel on this point. See below. Cf. Aquinas, *Summa theologiae*, 1a2ae, q. 94, a.5, ad 3; Duns Scotus, *Lib. IV sent. dis*. XV, q. II, 152; Biel, *Collectorium circa quattuor libros Sententiarum, Libri quarti pars secunda*, dis. XV, q. 2, 5–7.

[32] *Opus septipartitum*, q. 9, sig. D6r: "Ad illud argumentum respondetur tripliciter. Primo, quod maior intelligitur de lege naturali non revocata. Modo lex nature disponens omnia esse communia omnibus est revocata, quando homo cecidit ab innocentia, et ille modus dicendi esset conformiter ad Scotum in quarto, distin. XV, q. II. Dicit enim quod illud preceptum legis nature de habendo omnia communia revocatum est post lapsum."

Gratian characterized natural law as unalterable (*immobilis*) in contrast to written laws, which are apt to vary over time.[33]

The second solution, which Summenhart attributes to Alexander of Hales, is based on a three-fold division of natural law.[34] The basic idea is that natural law is made up of different kinds of sentences that oblige to different degrees. Summenhart says that "in the book of natural law, viz., in the intellect," there are three kinds of sanctions: precepts, prohibitions, and concessive sanctions, that is, sanctions that "do not prescribe or prohibit, but concede something."[35]

The point in referring to the three-fold division of natural law is that the concessive sanction does not create an absolute moral obligation, unlike the prescriptive and prohibitive sanctions. According to Summenhart, the precept to the community of things must be taken as a prescriptive sentence only in situations of extreme necessity. In general, it is a precept that only recommends or concedes. Because it is a concessive sanction of natural law, positive law can licitly rule against it. In that way the things of the earth could be appropriated

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[33] *Opus septipartitum*, q. 9, sig. D6r: "Sed contra istum modum soluendi arguitur quadrupliciter. Primo sic. Lex naturalis est immutabilis, sed si esset revocata, esset mutabilis, igitur. Maior probatur dupliciter. Primo, quia in decretis distinctio VI, § his itaque, ait Gratianus. Naturale ius ab exordio rationalis creature incipiens manet immobile, volens per hoc assignare differentiam eius ad legem scriptam. Secundo probatur, quia ibidem distinctio V, ait. Ius naturale cepit ab exordio creature rationalis, nec variatur tempore, sed immutabile permanet." See *Decretum*, D5; D6 C3.

[34] See Alexander of Hales, *Summa*, Part 3, q. 27, membr. 4, art. 1, § 2. The *Summa*, which is attributed to Alexander of Hales, in fact had several contributors. This solution based on the three-fold natural law was developed by medieval canon lawyers in the twelfth century. The canonist Rufinus seems to have been the first to suggest it. It was then adopted by theologians, for example, Hugh of St. Victor to whom Alexander of Hales refers in his account. For the contribution of the medieval canonists, see Tierney 2001, 383–386.

[35] *Opus septipartitum*, q. 9, sig. D6v: "Unde sciendum quod in libro legis naturalis scilicet in intellectu qui est ut liber legis naturalis, reperiuntur triplices sanctiones legis naturalis, quedam enim sunt sanctiones preceptive, ut illa. Quod tibi fieri vis aliis facias. Quedam sunt prohibitive, ut illa. Quod tibi fieri non vis aliis non facias. Alique vero sunt concessive, id est non precipiunt, nec prohibent, sed concedunt aliquid, et ille sunt duplices, quedam enim concedunt aliquid tanquam utile, et talis fuit illa sanctio que concessit pro statu innocentie communitatem rerum ut omnia essent omnibus communia eo quod illa communitas conferebat ad finem humane felicitatis pro illo statu, quedam autem concedunt aliquid tanquam expediens, ut sanctio illa que concedit quod res pro statu nature corrupte approprientur, et de istis videatur Alexander de Ales in tertia parte summe, questione XXVII, membro IIII, articulo primo."

licitly by positive human law, although this course of action conflicts with the (concessive) precepts of natural law.[36]

Although Summenhart takes the second solution as sufficient to disprove the counter-argument, he does not seem to be fully satisfied with it. It is characteristic of this solution that it deprives the institution of private property of a direct, natural law-based justification. Although it would be licit to appropriate things by human law against the concessive sanction of natural law, this would still go against natural law. In his own interpretation, Summenhart furthers the view that gives private property a direct and strong natural law-based justification. This means that the appropriation is positively in accordance with natural law or even that natural law dictaes that private property be established in the reality of fallen man.

The basic ingredients of Summenhart's argument are present in the third solution, which he introduces in order to refute the counter-argument described above. This solution is also heavily indebted to Alexander of Hales. In contrast to what was claimed in the second solution, Summenhart admits that the sanction of natural law, which dictates that all things should be common to all, can be taken as a sanction that commands the community of all or prohibits the appropriation of things. However, he emphasizes that it should be understood to concern mankind in the state of rightly instituted nature, not mankind in the present state of corrupted nature. The point is thus that natural law dictated the community of all in Paradise only.[37]

But how is this view compatible with the concept of natural law as immutable? Summenhart's solution is based on a special interpretation

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[36] *Opus septipartitum*, q. 9, sig. D6v: "Ideo secundus modus soluendi, est concedendo maiorem quando tale quid sit contra legem preceptivam vel prohibitivam, et hoc modo minor est falsa, quia lex naturalis concedens communitatem in rebus non est preceptiva precipiens scilicet communicationem nisi in casu necessitatis, sed tamen est concessiva. Modo contra illius sanctionem concessivam tamen, potest aliquid licite fieri iure positivo id disponente, ut licitum est transire per agrum alienum quia illud est de sanctione legis naturalis sed non nisi concessiva, et tamen iure positivo factum est illud illicitum."

[37] *Opus septipartitum*, q. 9, sig. D6v: "Tertius modus soluendi est concessa maiore sine distinctione, neganda est minor, quia lex naturalis disponens communitatem in rebus etiam si esset preceptiva illius communitatis vel prohibitiva appropriationis, non intelligitur nisi quo ad homines in natura bene instituta, non autem quo ad homines nature corrupte. Modo nunc homines sunt in natura corrupta, igitur. Et hii duo ultimi modi soluendi essent conformiter ad Alexandrem de Ales ubi supra." This solution is a part of Alexander's discussion of the immutability of natural law in *Summa theologiae*, part 3, q. 27, membr. 3, art. 2.

of the nature of natural law. As did Alexander of Hales, Summenhart refers to Augustine's explanation in the *Confessions*.[38] Augustine, Summenhart reports, maintained that it is not true to say that natural law was changed or modified, although natural law first dictated that all things should be common to all men, and then later, that the opposite practice should take place. This arrangement does not indicate any alteration in natural law itself, but indicates an alteration in man. Summenhart elucidates this point with the same example used by Augustine, who compared natural law to the rules of medicine. "The rule of medicine that says that drinking wine is suitable for men is not revoked if all men should suddenly be attacked by fever and the wine began to disagree with them. This is because this rule of medicine should be understood to concern healthy men only."[39]

The comparison of natural law to the art of medicine is interesting because it leads us to think of natural law as a kind of art of reason rather than a collection of fixed principles. Summenhart's account is fully in line with this emphasis. In speaking of the community of things, Summenhart stresses:

> The right reason from which the law of nature proceeds would never dictate this [i.e., the community of things] concerning corrupted men, because right reason would always see the previously mentioned four bad consequences emerging from the community and indivisibility of things among such men.[40]

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[38] The reference to the *Confessions* is, however, misleading. According to John Kilcullen, the proper locus is either *De vera religione* xvii, 34, or *Contra Faustum*, XXXII, 14. Kilcullen 1995, note 72.

[39] *Opus septipartitum*, q. 9, sig. D6v: "Regula medicinalis dicens vinum esse potum hominibus congruum, non deberet dici revocata si omnes homines inciperent febricitare, et ita vinum inciperet eis discongruere, quia non intelligeretur illa regula nisi de hominibus sanis, ergo etiam sic erit hic. Et hoc est etiam exemplum beati Augustini in libro confessionum ad ostendendum quom lex naturalis non debet ex hoc dici variata vel mutata quod ipsa concedente omnia communia omnibus, postea oppositum fuit ordinatum. Nam hec ordinatio non arguit mutationem in ipsa lege naturali, sed arguit mutationem ex parte hominis." Essentially, Alexander maintained that the state of innocence and the present state of man are two different cases, and for these, natural law includes two different sanctions: the community of all in the state of innocence and private property in the state of sinful nature. In this form, Alexander's solution was repeated in the Franciscan literature, for example, by Bonaventure. See Alexander of Hales, *Summa theologiae*, part 3, q. 27, membr. 3, art. 2, and Bonaventure, *Lib. II Sent*., dist. 44, a. 2, q. 2, ad 4.

[40] *Opus septipartitum*, q. 9, sig. D6v: "…nunquam recta ratio a qua procedit lex nature hoc dictasset de corruptis hominibus, quia semper recta ratio vidisset talibus

Although Summenhart does not explain his view in so many words, the implication seems clear. In his view of natural law, natural, right reason is logically prior to the dictates of natural law. What right reason dictates in a given situation is natural law. This interpretation is theoretically significant, because it enables Summenhart to provide a direct, natural law-based justification for private property while maintaining the traditional principles of the immutability of natural law and of the original community of things under that law.

This approach gives rise to another theoretical problem. As we have seen, Summenhart's terminology equated private and exclusive *dominium* with civil *dominium*. Now, if natural law dictates the distinction of *dominium* in this fallen reality, it seems that natural *dominium* (i.e., *dominium* conceded by natural law) can also be private as is civil *dominium*. This is a problem that Summenhart resolves in Question 10.

Question 10 is entitled "Whether the division of dominions was done by natural or human law."[41] Summenhart treats this as a pseudo-problem. He remarks that if this question is properly understood, the answer would follow directly from the terms of the question, because it is taken to inquire whether human civil *dominium* is established by human or natural law. The answer is trivial and—according to him—does not cause problems for anyone. Further, he emphsizes that he discusses the question only because other writers have treated it as a difficult matter.[42] Yet this dismissive attitude is clearly an oversimplification, for in Summenhart's own theory, the relation of natural law to the institution of private property was not self-evident, but needed further clarification.

Although Summenhart makes little of the original problem, he takes on another question: How can we prove that the division of dominions was not made by natural law in the fallen state of mankind? Summenhart presents two proofs. The first is based on the

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existentibus hominibus emergere predicta damna quattuor ex rerum communitate et indistinctione."

[41] *Opus septipartitum*, q. 10, sig. E2r: "Utrum distinctio dominiorum fuerit facta per legem naturalem vel humanam."

[42] *Opus septipartitum*, q. 10, sig. E2r: "Prima conclusio. Sane intelligendo titulum questionis, questio nullam habet difficultatem, quin certum sit quod dominiorum distinctio tamen est secundum legem civilem et humanam, probatur, quia sanus intellectus tituli questionis est, per quam legem fuerint dominia civilia erecta vel facta, modo hoc quesitum nullam habet difficultatem, quia ex terminis questionis patet responsio… Sed tamen exquo alii tractantes illam questionem respondent ad eam quasi difficultatem habentem, ideo subiungo etiam tres conclusiones, est ergo."

inner coherence of natural law, which Summenhart attributes to the Franciscan masters John Duns Scotus and John de Ripa. The central principle is that nature (and natural law) do not incline or dictate the opposites. It is taken for granted that in the state of innocence, everything was common to all by nature. Were natural law—which is immutable—to order the appropriation of things and the distinction of *dominia* in the state of fallen nature, then it would contradict itself by commanding the opposites.[43] According to Summenhart, this reasoning is invalid; it does not prove that private property was not established by natural law. He notes that when natural law dictates that all things should be common to all, it dictates this only for those people who are in a state of integral nature; when it dictates things are to be appropriated among men, it dictates this for corrupted men. To clarify his view further, Summenhart repeats the analogy with medicine. If a rule of medicine states that wine should be given to John when he is well, but not when he has fever, then the rule does not thereby dictate the opposite, because such rules do not concern the same man in the same condition. Similarly, although natural law dictates community and the ownership of things in different situations, it does not dictate the opposites.[44]

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[43] *Opus septipartitum*, q. 10, sig. E2v: "Tertia conclusio. Dominiorum distinctio etiam pro statu nature lapse non est secundum legem naturalem, probatur per Scotum in IIII, ubi supra, et per Johannem de Ripa, ordinis minorum sic. Nam sicut natura non inclinat ad opposita, sic etiam lex naturalis non inclinat ad opposita, modo lex naturalis inclinat et disponit ut omnia sint omnibus communia igitur illa eadem non inclinat nec disponit ad hoc ut res approprientur et dominia distinguantur, cum igitur lex nature sit eadem pro statu tam innocentie quam nature corrupte, sequitur quod sicut disposuit omnia debere esse communia pro statu innocentie, sic etiam disponit pro statu nature corrupte, et per consequens distinctio dominiorum non est per legem naturalem, hanc rationem tangit Scotus in IIII distinctio XV, questione secunda, et etiam Johannes de Ripa ordinis minorum in quodlibetis."

[44] *Opus septipartitum*, q. 10, sig. E2v: "Sed quamvis conclusio sit vera, tamen illa probatio non valet, quia si illa lex naturalis que disponit omnia esse communia omnibus, poneret res esse appropriandas hominibus, non propter hoc inclinaret seu disponeret ad opposita. Probatur, quia quando lex naturalis disponit omnia esse communia omnibus, non disponit hoc nisi pro illis hominibus qui sunt nature integre non corrupte, sed disponendo res esse hominibus appropriandas disponeret hoc pro hominibus nature corrupte et sic de diversis disponeret communitatem et proprietatem rerum, et per consequens non disponeret opposita, quia opposita sunt opposita respectu eiusdem, patet per simile. Nam si aliqua regula medicinalis artis disponat vinum esse dandum Johanni cum sanus est, et eadem disponat eidem cum febricitat non esse dandum, non disponit opposita, quia non respectu eiusdem hominis eodem modo se habentis."

The salient point is, that if Summenhart had accepted the first proof, he would at the same time have adopted the concept that the appropriation of things lacks a direct moral justification. Any proof that is based on the idea that natural law does not directly order the division of dominions would lead him to the same position. It is not surprising, therefore, that Summenhart's own proof is not based on the content of natural law, but rather on the nature of natural law; that is, he argues that natural law is of such a nature that it cannot establish private property.

> Secondly, this conclusion is proved so, because natural law, which concedes someone a certain *dominium*, is a statement of the natural light of reason, so that reason is naturally born to form that law and to adhere to it. However, natural reason is not born to form the kind of law that says that this thing is Peter's and that thing is John's, but civil law is disposed in that way.[45]

The appropriation of things means that a person's relation to a thing is private in the sense that it excludes others from the same relation. If a thing becomes Peter's property, then it is not only given to Peter but also taken away from John. In regard to the original position of equality, this arrangement is an established form of inequality in which people are put in unequal positions in regard to the things of this world. According to Summenhart, natural law is not disposed to make that kind of particular arrangement.

Summenhart summarizes his view of the relationship between natural law and private property in a section that also analyzes the suggestion that private property is of natural law. He points out that there are two ways to understand the idea that the appropriation and division of dominions is of natural law. First, this can be taken in the "indicative" sense that natural law indicates or commands that the distinction should take place. Summenhart concludes that private property is of natural law in this indicative sense. Second, the suggestion could be taken to mean that private property is effectively or executively of natural law, so that an effective appropriation and division proceeds

[45] *Opus septipartitum*, q. 10, sig. E2v: "Secundo probatur illa conclusio sic, quia lex naturalis concedens alicui aliquod dominium est nota naturali lumine rationis, ita quod ratio naturaliter nata est formare talem legem et ei adherere. Modo ratio naturalis non est nata formare talem legem que dicat hec res sit Petri, hec sit Johannis, sed lex civilis sic disposuit."

from natural law. Summenhart stresses that private property is not of natural law in this sense.[46] As he points out:

> The appropriation of things would not follow as an effect from natural law, no matter how forcefully that particular dictate of natural law is written in the practical intellect of every human being—either a prince's or a father's or anyone else's—if it were not followed by an act of will by the man who has the power to dictate that this thing should be his and that other thing another's and so on. And this act of will becomes law, not natural but positive.[47]

According to Summenhart, natural law commands the appropriation of things in the present state of mankind, but it cannot cause the appropriation into being. There has to be someone or something with the power and the will to dictate that this thing belongs to this person and that thing to someone else. This dictate is positive law.

4.1.4. *The institution of private property by positive human law*

Although Summenhart managed to provide a direct, natural law-based justification for private property, this still left the justification of private property incomplete. The fact that natural law demands private property is not sufficient to prove that the institution of private property could be established licitly. This is because, as Summenhart emphasizes, the appropriation of things was not made by natural law. Therefore, it still needs to be shown that the institution of private property could have been made licitly by positive law. Summenhart acknowledges this at the beginning of Question 11, and from this starting point, he sets out to answer the question: "In what way and in how many ways could the division of dominions be done justly by

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[46] *Opus septipartitum*, q. 10, sig. E3r: "Nam distinctionem vel appropriationem dominiorum esse a lege naturali potest intelligi dupliciter. Uno modo quod sit ab ea indicative, sic quod lex naturalis indicet vel disponat (saltem in generali) quod distinctio dominiorum debeat fieri, et sic conceditur conclusio, et sic etiam argumentum procedit. Alio modo quod sit effectualiter et executive ab ea, sic quod illa effectualis appropriatio et distinctio processerint a lege naturali, et hoc negatur."

[47] *Opus septipartitum*, q. 10, sig. E3r: "Nam quantuncumque predictum complexum existens naturalis lex, scriptum esset in intellectu practico hominis cuiuscumque, sive principis sive patrisfamilias sive cuiuscumque alterius non fuisset per ipsum ad effectum posita appropriatio rerum, si non supervenisset volitio hominis habentis potestatem, et volentis quod illa res deberet esse illius et alia alterius, et sic de aliis. Illa autem volitio fuit lex non naturalis sed positiva."

positive law?"[48] In his answer Summenhart follows the exposition of Antoninus of Florence.

Summenhart starts with the criteria for a just, positive law, positing that for the just division of dominions by positive law, it is sufficient that positive law is just.[49] As did Antoninus, Summenhart sets two conditions for a just positive law. First, the lawmaker must have legitimate power over those whom the law concerns. Second, the lawmaker must be prudent or have prudence in the sense that he has prudent advisors.[50] Of these requirements, the first is more basic, because a positive law needs to satisfy this condition in order to be a valid law at all. This is because law (*lex*) is derived from binding (*ligando*), and to bind someone in something presupposes power over him.[51]

But who has legitimate power in human society? Summenhart follows Antoninus in pointing out that some might argue that things

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[48] *Opus septipartitum*, q. 11, sig. E4v: "Exquo dominiorum distinctio licite fuit facta, et non nisi per legem positivam, queritur quis et quottuplex potuit fuisse modus quo per legem positivam talis distinctio fuit iuste facta."

[49] *Opus septipartitum*, q. 11, sig. E4v: "Prima suppositio ad hoc quod per legem postivam distinctio dominiorum fuerit iuste facta, sufficit quod lex positiva fuerit iusta, quia effectus iuste legis est iustus, modo distinctio dominiorum facta per legem positivam est effectus legis positive, igitur suppositio vera."

[50] *Opus septipartitum*, q. 11, sig. E4v: "Secunda suppositio. Ad hoc quod aliqua lex positiva sit iusta lex requiruntur due conditiones. Prima quod ille a quo lex fuit lata, habuerit potestatem eam ferendi. Nam sine illa potestate illud quod per ipsum est dictatum nec habet rationem legis, nec etiam rationem iuste legis. Primum probatur, quia lex dicitur a ligando, dictatum autem per eum qui non habet potestatem in me, non habet me ligare secundum quod per eum est dictatum, igitur. Secunda conditio (que regulariter loquendo etiam requiritur) est quod ille a quo est lata, habuerit prudentiam in se vel in suis. Probatur, quia requiritur ad legem iustam quod nihil in ea sit dispositum contra dictamen recte rationis vel equitatem, modo ad vitandum tale quid requiritur regulariter prudentia, que est recta ratio rerum agibilium, id est habitus intellectualis inclinans ad dictandum recte in agibilibus." This was a Scotist description that can be traced back to John de Ripa, who was Antoninus's source. See Antoninus of Florence, *Summa theologiae*, part III, chap. 3, sig. F2r.

[51] Summenhart says that it may sometimes be possible that a particular law is just, although the second criterion is not fulfilled. He stresses, however, that this depended on chance. *Opus septipartitum*, q. 11, sig. E4v: "Dixi autem notanter regulariter loquendo. Nam staret quod ille a quo lata est lex iusta, non haberet prudentiam, et tamen lex per eum lata nihil contineret iniquitatis, sed omnem equitatem, sed hoc est tunc casuale et non regulare. Nam carens prudentia potest a casu dictare aliquid quod omnem continet equitatem. Dictum etiam est in se vel in suis, quia non oportet (supple quo ad rationem efficacis legis) iuste semper quod ipse qui tulit legem, habeat in propria persona prudentiam, quia oppositum patet in aliquibus principibus parum vel nihil habentibus prudentie qui tamen habent consiliarios prudentia pollentes quorum consilio et auxilio conduntur leges iuste. Et hec due conditiones differunt in hoc, quia prima requiritur ad utrumque scilicet tam ad hoc quod sit lex quam ad hoc quod sit iusta, ut probatum est. Secunda autem tamen ad hoc quod sit iusta."

which first were common to all could not be justly divided among men by positive law. The reason is that, from the Fall of Adam up to the present day, nature has created all men equal, and consequently, no one has power over others. Thereby, no one can justly dictate a law to divide things among men. Therefore, when the appropriation took place and some people were deprived of things over which they previously had *dominium*, this event could not have occurred justly.[52] The theoretical justification for private property thus presupposes an account that shows how positive human laws can justly be imposed on a community of equals.

Following Antoninus's lead, Summenhart introduces his answer by distinguishing two kinds of power. Referring to the first book of Aristotle's *Politics*, Summenhart writes that "there are two kinds of power that one man has over others": paternal and political. Paternal power is personal power in the sense that the father has this power over his children, and it is appropriate to him by natural law. Paternal power is also non-regional in the sense that it concerns a person's descendants, irrespective of where they live. Political power is based on consent: it "is appropriate to the one it is appropriate to by the common consent of those over whom he has power; he has power over others only because these have consented that he has power over them." Political power is also regional in the sense that it concerns all those who live within a particular region.[53]

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[52] *Opus septipartitum*, q. 11, sig. E5r: "Prima conclusio. Licet videri posset alicui quod cum res essent primum omnibus communes non potuerit postmodum humano genere lapso, fieri per legem positivam iusto modo earum distinctio et appropriatio, tamen oppositum est verum. Prima pars probatur propter tale argumentum. Nam diceret aliquis, lapso humano genere adhuc natura omnes homines equales genuerat, et per consequens nullus habebat potestatem in alios. Modo nullo habente potestatem super alios, non potuit iuste fieri appropriatio lege alicuius hominis cum illa lex non potuerit iuste super eos ferri per non habentem potestatem, et per consequens quando fuit appropriatio facta et aliqui fuerunt privati illis rebus quarum tamen prius habuerant dominium, non potuit id fieri iuste."

[53] *Opus septipartitum*, q. 11, sig. E4v: "Duplex est potestas quam unus homo habet super alios, secundum quod etiam tangit Arestoteles primo politice. Quedam est paterna quam habet pater super filios, inquantum talis et convenit sibi lege naturali. Alia est politica, et illa convenit ei cui convenit ex communi consensu eorum super quos habet eam. Ex hoc enim quod aliqui consentiunt quod aliquis alius ab eis habeat potestatem super eos, ille habet potestatem illam. Et differunt hee due potestates, quia prima ei cui convenit, convenit tamen super ab eo descendentes, etiam ubicumque illi habitent. Secunda autem tam super ab eo descendentes quam extraneos, attamen cohabitantes."

Summenhart's point is that the natural equality of men does not exclude all power over others. Both paternal power and political power are consistent with the natural equality of men. As to paternal power, Summenhart remarks that nature creates a son to be unequal in power with respect to his father, because it naturally creates him to be subject to his father.[54] The matter is different in regard to political power:

> Nature creates all men equal, as equality excludes political power and political subjection, because this power and subjection is not of nature. Nevertheless, by the voluntary subjection in which men subordinate themselves to the power of someone else, inequality is introduced so that one has such a power over the others.[55]

Justified political power is based on voluntary subjection. Its prerequisite is that the individual has the power to subordinate himself, that is, the individual is seen as master of himself to the extent that he can subordinate himself to the political ruler. While demonstrating how this subordination can be just, Summenhart also refers to the limits of voluntary political subordination:

> If some men could be ruled better by someone else than themselves and be better defended than if they ruled by themselves and resorted to their own men, then they could justly subordinate themselves to that other in everything which is not against the law of nature or of God.[56]

The implication here is that voluntary political subjection can be extensive, but it cannot be arbitrary or absolute. It should have reasonable cause and never go beyond the restrictions posited by natural law and God's positive law.[57]

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[54] *Opus septipartitum*, q. 11, sig. E5r: "Nam antecedens est falsum si equalitas illa excludat omnem potestatem unius super alium. Nam natura genuerat filium inequalem patri in potestate, quia genuit eum naturaliter subiectum patri."

[55] *Opus septipartitum*, q. 11, sig. E5r: "…quamvis natura genuerat omnes homines equales, prout equalitas excludit potestatem politicam et subiectionem politicam, quia illa potestas et subiectio non est a natura. Attamen nihilominus ex voluntaria subiectione qua homines se subdiderunt alterius potestati, facta est inequalitas ut unus habeat potestatem talem super alios."

[56] *Opus septipartitum*, q. 11, sig. E4v: "…si aliqui melius possunt regi per aliquem alium a se, meliusque defendi quam si per se regerentur ac viribus propriis inniterentur, illi iuste se possunt submittere illi alteri in his que non sunt contra legem nature vel dei."

[57] Here, the parallelism to Summenhart's concept of the natural right of liberty is implicit. As stated in chapter 2, Summenhart conceptualized *libertas* as a self-mastery that was limited by the prohibitions of the law. Thereby, the limits of voluntary subordination and political power are parallel to the limits of man's natural liberty.

Like Antoninus, Summenhart suggests three alternative ways that lead to a just division of dominions by positive law. The distinction could have been made, first, by a law enacted by the one who has paternal power and. second, by a law dictated by the political ruler.[58] In both cases the one with power could either divide things directly by dictating that this part belongs to this person and that part to another or by dictating that every person will have as property all those things which he has possessed earlier when not under anyone's exclusive dominion.[59] Along with these ways, Summenhart introduces a third that would not presuppose the existence of a superior power as a necessary condition. He points out that:

> …and if no one had power over others, things could still be divided and appropriated by human volition. This is proven, because men who had [all] things in common could divide and appropriate them by common agreement, and in that case no injustice or injury or prejudice would be done to anyone, because willingly there is no injury.[60]

In this view a common agreement is taken as a legitimate source of positive law. Summenhart uses the Roman law maxim, "willingly there is no injury" (Dig. 47,10,1,5) to support his view that attributes to the community of equals the ability to function as a legislator and thus literally be an autonomous community.[61]

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[58] *Opus septipartitum*, q. 11, sig. E5r: "Secunda conclusio. Modus quo per legem positivam est facta distinctio dominiorum potuit esse triplex. Probatur. Nam illa distinctio potuit esse facta per aliquod complexum dictatum, aut ab habente potestatem paternam, aut ab habente potestatem politicam…"

[59] *Opus septipartitum*, q. 11, sig. E5v: "Quod si divisio est facta per patres vel per principantem politice non tamen per aliquod dictatum predicto modo, scilicet quod hec pars deberet esse illius alia alterius, potuit tamen esse facta per aliquod aliud complexum dictatum scilicet per tale. Quicumque occupaverit prius aliquam rem que in nullius est dominio, habeat eandem in proprietatem secundum quam legem fuit communiter distinctio facta, et illud dictatum potest dici lex positiva…"

[60] *Opus septipartitum*, q. 12, sig. E5r: "…etiam si nullus habuisset potestatem super alium, adhuc potuissent res humana volitione fuisse hincinde distincte et appropriate. Probatur, quia homines quibus res fuissent communes, potuissent communi consensu eas distinxisse et appropriasse, et tunc nulla iniusticia nec iniuria nec preiudicium fuisset alicui factum, quia volenti non fit iniuria."

[61] *Opus septipartitum*, q. 11, sig. E5r: "…aut per dictatum de communi consensu hominum, sine dictatione alicuius alterius habentis potestatem super ipsos, quodlibet autem taliter dictatum, potest dici lex positiva, igitur." Burns has noted here "a distinctively individualistic concept of consent," which, it is true, "is not fully developed" by Summenhart. See Burns 1991, 145–146.

4.2. *The rights of use* (usus) *and usufruct* (usufructus)

Following Antoninus of Florence, Summenhart moves from the justification of private property to discuss the paradigmatic juridical rights that in medieval jurisprudence were associated with the use and possession of material things. The rights under discussion are the right of use or *usus*, usufruct (*usufructus*), ownership (*proprietas*) and possession (*possessio*). As is his style, Summenhart clarifies these rights with the aid of definitions and commentaries. The four definitions are the same as those presented by Antoninus in his *Summa*. Yet Antoninus did not compose those definitions himself. They derive from earlier juridical discourse: The definitions for *usus* and *usufructus* are standard definitions originating in the text of *Corpus Iuris Civilis*, and the definitions of *proprietas* and *possessio* are derived from medieval jurisprudence. These were introduced by the famous commentator Portius Azo at the beginning of the thirteenth century. Azo's definitions were then used by many later lawyers, for example, Hostiensis (Henricus de Seguso), the great canon lawyer of the same century. Hostiensis's *Summa aurea* is in fact another major source for Summenhart's discussion. In certain chapters, such as the discussion of *possessio*, Summenhart acknowledges his dependence on Hostiensis's *Summa*, but he uses it in other places as well without calling attention to his source, as is his normal practice with respect to Antoninus's *Summa*.[62]

Summenhart devotes two questions (12–13) to the discussion of *usus* and *usufructus*. He launches his inquiry by asking:

> Whether those descriptions of *usus* and *usufructus* are good, which state that *usus* is the right of using another's things, preserving the substance of the things, and, *usufructus* is the right of using and enjoying the things of another, preserving the substance of the things.[63]

The authority of these definitions was indisputable in medieval jurisprudence. There were slight variations in the word order, but beyond that, these two definitions were considered normal descriptions of the

[62] During the late medieval period, Azo's *Summa* was considered a standard text in Roman law. In canon law, Hostiensis's *Summa* enjoyed similar authority. Summenhart's choice of authorities can therefore be taken as a conventional one and does not indicate any special acquaintance with the juridical thought of his time.

[63] *Opus septipartitum*, q. 12, sig. E5v: "Utrum descriptiones usus et usufructus sint bone quibus dicitur. Usus est ius utendi alienis rebus salva rerum substantia. Usufructus autem est ius utendi et fruendi rebus alienis, salva rerum substantia."

rights of use and usufruct. Of the definitions, only that of *usufructus* was explicitly stated in the corpus of Roman law. The ancient Roman lawyers conceived *usus* as a modification or fraction of usufruct and approached the concept through *usufructus*, by making restrictions on the right of using and enjoying a thing. For example, in *Digesta* Ulpian outlined *usus* in a few lines: "To whom *usus* is given, can use, but cannot enjoy."[64] The medieval commentators on Roman law spelled out this concept in the definition given above by Summenhart.[65]

The starting point for Summenhart's discussion is the idea that in juridical discourse, the terms *usus* and *usufructus* are used in more than one sense. Consequently, in order to accept the definitions as good ones, the use of the terms themselves needs to be specified. Summenhart introduces three qualifications for the term *usus,* and repeats them in discussing *usufructus*. Each of these qualifications narrows the usage of each term further. Each also refers to or is a reaction to a feature given in the definition. The first qualification creates correspondence with the genus term, and the two that follow concern the special differences of that term. Accordingly, the qualifications suggests that *usus* and *usufructus* are (1) rights (2) understood as servitudes (3) over non-consumable things.[66]

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[64] Dig. 7.8.2: "Cui usus relictus est, uti potest, frui non potest."

[65] Summenhart's definition of *usus* is an exact match with the definition that was given by the commentator Accursius in his *Glossa ordinaria*. As to the definition of *usufructus*, the word order in Summenhart's definition follows the definition of *usus*, but differs from the *Digesta*'s definition (and Accursius's). See Accursius, *Glossa in Digestum vetus*, liber 7, 265, 288. Also, the word order in Summenhart's definitions differs from those of his primary sources: Antoninus of Florence and Hostiensis.

[66] *Opus septipartitum*, q. 12, sig. E6r: "Prima conclusio. Descriptio usus est bona salvis tribus circumstantiis. Prima scilicet quod capiatur usus pro iure utendi, ut in prima suppositione. Secunda quod capiatur pro tali iure pro quali ipsum accipiunt domini legiste, ut in secunda suppositione. Tertia quod capiatur proprie, ut in quarta suppositione. Probatur, quia convenit omni contento sub diffinito, et facit diffinitum differre a quolibet alio, et sic de aliis conditionibus." Summenhart's conclusion on usufructus is identical. See *Opus septipartitum*, q. 12, sig. E7r. According to Summenhart, a definition is good if the definition fits every example of the defined and makes the defined differ from everything else in the same genus. This was the basic Aristotelian criterion for the goodness of a definition. See e.g., Oresme's and Buridan's usage in the context of *De anima*, in *Nicolai Oresme expositio et questiones in Aristotelis De anima*, p. 119.

4.2.1. *Use and usufruct as rights*

Summenhart begins his discussion with an observation that has echoes of the discourse on Franciscan poverty from two centuries earlier.[67] He observes that the term *usus* is understood in two senses. First, it may refer to the act of using, and in this sense "the actual riding of a horse, the actual living in a house, and the actual eating of bread is called *usus*." In the second sense, the term *usus* refers to the "right of exercising *usus* in the first sense." With this distinction, Summenhart is making a two-fold point. The first point is that, if we are to hold to the goodness of the definition of *usus*, then the term should be taken to signify "right of using." The second point is that *usus* as an "act of using" is relevant to understanding the right of using. Summenhart states that the defined term does not signify the act of using; however, the term is used in that sense in the definition of *usus* and *usufructus*. Although *usus* as an "act of using" and *usus* as the "right of using" are thus connected, Summenhart stresses the real distinction between the two. He notes that the act of using is also called the "use of fact" involving the idea of distinguishing "fact from right." In this sense, the "use of fact" signifies the "use which is an act or a fact, but which is not a right of acting in this way, although it can proceed from that right." Further, Summenhart refers to the principle of independent existence to demonstrate that the two definitions of *usus* are distinct "because the one can exist without the other, for example, when a person is not using a thing, the use of which is conceded to him, but nonetheless has the right of using it."[68]

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[67] See Mäkinen 2006, 53. See also chapter 1. above.

[68] *Opus septipartitum*, q. 12, sig. E5v: "Prima suppositio. Usus capitur dupliciter. Uno modo pro actu utendi, et sic actualis equitatio equi, actualis inhabitatio domus, actualis comestio panis dicitur usus, et illo modo usus est res successiva, nec hoc modo capitur ut est hic diffinitum, sed hoc modo capitur hic, quando diffinit, id est quando ponitur in diffinitione usus et usufructus, et usus talis dicitur usus facti, prout scilicet factum distinguitur contra ius, id est accipitur pro usu qui est actus vel factum quoddam, non autem est ius actum agendi licet possit procedere ex illo iure. Alio modo capitur prout idem est quod ius exercendi usum primo modo captum, et illud ius distinguitur ab actu utendi, quia unum potest esse sine altero. Nam cum quis non utitur aliqua re, cuius tamen usus est sibi concessus, nihilominus habet ius utendi ea, et hoc secundo modo usus est res permanens…et hoc modo capitur hic quando diffinitur." Here, Summenhart also describes the distinction between the two senses of *usus* using a classification that derives from natural philosophy: he notes that *usus* as a fact is a successive entity (*res successiva*), whereas *usus* as a right is a permanent entity (*res permanens*). In medieval theory a successive entity was a thing defined by its duration in the sense that its essential parts were thought to exist in succession one

In discussing *usufructus*, Summenhart refers to his previous exposition on *usus* and posits a similar distinction between *usufructus* as an "act of using and enjoying things" and *usufructus* as the "right of using and enjoying" things. He notes that the term defined signifies the latter, but in the definition, the term is used in the former sense.[69]

4.2.2. Usus *and* usufructus *as servitudes*

Summenhart continues his account with the rationale that the correspondence between the terms and their definitions is not reached simply by taking *usus* and *usufructus* as rights. In discussing *usus*, he narrows its usage by remarking that *usus* should be taken in a strict or distinctly juridical sense, which differs from a more relaxed meaning.

> The second supposition: When *usus* is taken in the second way [as the right of using], it is still taken in two ways. Firstly, in the juridical sense, according to which [*usus*] by its own reason is separated from ownership (*proprietas*) and excludes the ownership of its subject, so that *usus,* which is the right of using a thing, is not compatible with ownership and *dominium perfectum* over the same thing in the same subject.[70]

Here, the demarcation is made with respect to ownership. Summenhart's explanation makes a direct reference to the definition, which explicitly states that the things that are used are the "things of another." According to him, "in this way civil lawyers (*domini legiste*) understand *usus*, because according to them, no one is said to have the *usus* of a thing unless that thing is the thing of another, so that ownership and dominion belong to another person."[71]

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after the other. By contrast, the essential parts of a permanent entity existed simultaneously. The distinction was relevant, for example, in the analysis of motion and time. See e.g., Trifogli 2000.

[69] *Opus septipartitum*, q. 12, sig. E6v: "Quinta suppositio, sicut usus fuit acceptus dupliciter, ut in prima suppositione, ita etiam usufructus. Nam primo capitur pro actu utendi et fruendi rebus, et sic capitur quando ponitur in diffinitione. Alio modo pro iure utendi et fruendi, et sic capitur quando ponitur pro diffinito."

[70] *Opus septipartitum*, q. 12, sig. E5v: "Secunda suppositio. Capiendo usum secundo modo, capitur adhuc dupliciter. Uno modo acceptione iuridica secundum quam ex sui ratione prescindit et excludit proprietatem a suo subiecto, ita quod usus id est ius utendi aliqua re non compatitur secum proprietatem et dominium perfectum super eandem rem in eodem subiecto…"

[71] *Opus septipartitum*, q. 12, sig. E5v: "…et hoc modo accipiunt usum domini legiste, quia secundum eos nullus dicitur habere usum alicuius rei, nisi illa res sit aliena, sic quod proprietas et dominium ad alium spectent…"

Summenhart associates this juridical concept with the idea of servitude. He explains that in the juridical view, there is a servitude related to *usus* "as if it were a correlation that corresponds to a relation." This means that when a person has the *usus* of a thing, "a certain servitude in the thing corresponds to his *usus*." Summenhart adds that by servitude, this thing is said to serve the holder of *usus*. The idea of servitude explains why the owner cannot have *usus*, for Summenhart notes that, as the lawyers say, "no one is served by his own thing" (*sua res nemini servit*).[72] Summenhart explains—quoting Antoninus's *Summa*—that civil lawyers identify two kinds of servitudes in things: personal and real. Personal servitude is such that the thing serves an animate thing, for example, man, "as when I have the right of crossing your field or garden, your garden serves me." In real servitude an inanimate thing serves an inanimate thing, "as when a field serves a field, an estate serves an estate."[73]

While concentrating on the strict sense of *usus* characteristic of juridical doctrines, Summenhart also regards a broader usage of the term *usus* as relevant, which does not denote demarcation with respect to ownership. "For if a person had ownership and perfect *dominium* of a thing, we would say that he has the right of using that thing of his and therefore *usus* understood as the right of using." This is not simply an idiom that is characteristic of everyday language, for Summenhart argues that even civil lawyers acknowledge that the owner of a thing has a certain *usus*, that is, when we are speaking of the causal *usus*. "For although the formal *usus* is separate from ownership, the causal *usus* is not." In medieval jurisprudence, the formal/causal distinction

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[72] *Opus septipartitum*, q. 12, sig. E5v: "…et ratio est, quia ipsi accipunt usum prout sibi correspondet servitus tanquam correlatio correspondens relationi sic quod ex hoc quod quis habet usum alterius rei, correspondet sibi in illo servitus quedam qua illa res sibi servit, secundum eos autem sua res nemini servit, capiendo servitutem eo modo quo ipsi accipiunt, et hoc modo capitur quando hic diffinitur." See Dig. 8.2.26. One way to describe servitude in Roman law is to say that servitudes were "encumbrances or burdens on ownership or on the thing owned." Nicholas 1962, 141.

[73] *Opus septipartitum*, q. 12, sig. E6v: "Modo secundum dominos legistas nulli res sua servit. Unde secundum eos in rebus reperitur duplex servitus scilicet personalis et realis. Personalis est quando res servit rei animate puta homini, ut cum habeo ius transeundi per agrum vel ortum tuum, ortus tuus servit mihi. Realis autem est quando res inanimata servit rei inanimate, ut ager agro, predium predio." Real servitude is impersonal; it stays with the land or thing and does not follow the person. In this way changes of ownership or third party inference have no effect on the burden. Real servitude is a substitute for the Roman title of predial servitude. For servitude in Roman law, see e.g., Thomas 1976, 195–207.

had been associated with *usufructus*, and Summenhart refers to that doctrine in order to prove the validity of his view. He remarks that civil lawyers posit a usufruct that is "not separated from ownership," and they call this causal usufruct. In reality, Summenhart says, this usufruct is nothing other than ownership or direct dominion itself. He concludes that, for the same reason, lawyers should in fact posit two kinds of *usus*, formal and causal.[74]

Summenhart clarifies the distinction between formal and causal usufruct as he reviews *usufructus* in light of the idea of servitude. As in the case of *usus*, he notes that sometimes *usufructus* is taken in a sense in which it is separated from ownership, so that a person cannot have usufruct of his own things.[75]

> Whence according to the master jurists, if I have the usufruct of a thing, a garden, for example, and if I later come to have ownership (*proprietas*) of this same thing, namely, the garden, the usufruct will expire. And in this sense, it [i.e., *usufructus*] is taken here and this usufruct is called formal, and sometimes it is called part of ownership (*pars dominii*), for the reason that the usufructuary is thought to be at the place of the owner, since he acquires the fruits as it were by ownership, but in reality it is not part of ownership according to Hostiensis.[76]

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[74] *Opus septipartitum*, q. 12, sig. E5v: "Alio modo non ita stricta acceptione qualis est illa iuridica acceptio in doctrina legali usitata, sed largiori secundum quam non excludit proprietatem seu dominium predicto modo, immo ipsum compatitur. Nam si quis habeat proprietatem et perfectum dominium alicuius rei, dicimus eum habere ius utendi illa re sua, et ita habere usum captum pro iure utendi, immo videtur quod etiam domini legiste ponunt aliquem usum in eo qui habet proprietatem rei loquendo de usu causali. Nam licet formalis usus prescindat a proprietate, non tamen causalis. Probatur assumptum. Nam ut patebit ipsi ponunt aliquem usufructum non prescindentem a proprietate quem vocant usufructum causalem qui est realiter ipsa proprietas vel dominium directum similiter aliquem usufructum formalem prescindentem a proprietate, ut patebit in sexta suppositione, igitur eadem ratione habent ponere duplicem usum cum omnino sit eadem ratio ponendi utrunque, ut patet intuenti rationem ponendi."

[75] *Opus septipartitum*, q. 12, sig. E6v: "Sexta suppositio. Sicut usus captus pro iure utendi fuit acceptus dupliciter, ut in secunda suppositione, ita etiam usufructus. Nam aliquando capitur prout prescindit a proprietate, et sic nullus habet usufructum alicuius rei cuius ipse idem habet proprietatem, sed oportet quod proprietas illius rei sit alterius."

[76] *Opus septipartitum*, q. 12, sig. E6v: "Unde secundum dominos iuristas si habeo usufructum alicuius rei, ut viridarii, si postea perveniat proprietas eiusdem rei scilicet viridarii ad me, expriat usufructus, et hoc modo capitur hic et ille usufructus vocatur formalis et aliquando dicitur pars dominii, eo quod usufructuarius loco domini habeatur, quia fructus ei tanquam dominio acquiruntur, sed in veritate non est pars dominii secundum Hostiensem." Here, Summenhart is using the term *dominium* as equivalent to *proprietas* to signify ownership.

This rather dense quotation exemplifies Summenhart's usage of his sources, which becomes more direct and wordy the more his discussion becomes entangled with the details of juridical doctrine. Here, he begins by following Antoninus of Florence in describing how the acquisition of ownership leads to the extinction of usufruct. Then Summenhart turns specifically to Hostiensis's *Summa* and gives a condensed summary of Hostiensis's discussion of the idea of usufruct as part of ownership (*pars dominii*). The point is that usufruct has a certain resemblance to ownership, for the usufructuary appears as the owner with respect to the fruits of the thing held by the usufruct.

The characterization of usufruct as *pars dominii* appeared in the *Digesta* (Dig. 7.1.4). In medieval discourse this characterization became a source of some dispute. The problem with this interpretation was that it seemed to contradict the more widely recognized view that usufruct is a servitude (Dig. 50.16.25) and as such, is classified as a right in another's things (*ius in re aliena*).[77] Hostiensis sought to solve this dilemma with the aid of two distinct meanings of usufruct: formal and causal. In speaking of formal usufruct Hostiensis reached the conclusion that Summenhart repeated above, i.e., usufruct is not really *pars dominii*. This was because in the formal sense, usufruct corresponded to the idea of servitude, and servitude was, by definition, separate from ownership. Hostiensis was able to hold to the idea of usufruct as *pars dominii* by recognizing that causal usufruct is *pars dominii*. He defined causal usufruct as belonging to the person who has the cause of ownership (*causa dominii*). Thus, in Hostiensis's view, usufruct is a part of ownership (*pars dominii*) in the sense that the (causal) usufruct can be predicated of ownership.[78]

Summenhart does not repeat the exact idea of causal usufruct as *pars dominii*. Yet he does make use of the term "causal usufruct." He maintains that, in addition to the strict or formal sense, the term *usufructus* can be taken in another sense in which it is not separate from ownership. He notes that even lawyers recognize that an owner

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[77] Hostiensis listed the chapters pro and contra the idea of usufruct as *pars dominii*. See Hostiensis, *Summa aurea*, liber III, De pignoribus, 995.

[78] Hostiensis, *Summa aurea*, liber III, De pignoribus, 995: "Et iste ususfructus dicitur formalis, qui etiam a proprietate recepit separationem… Causalis autem usufructus dicitur, quem aliquis habet causa dominii, et talis non dicitur servitus… sed primus ususfructus, scilicet formalis dicitur pars dominii, cum usufructuarius loco dominii habeatur, quia fructus ei tanquam dominio acquiruntur…sed in veritate pars dominii non est… Sed secundus, scilicet causalis, pars dominii est…"

has the usufruct of his own thing, "since he can use and also enjoy that thing, and they call this causal."[79] But why is this usufruct called causal? Summenhart gives his own interpretation as follows:

> Because the person who has the ownership of a thing also has by that very fact usufruct virtually, since he can by reason of its ownership convey (*transfundere*) the right of using and enjoying that thing to another person.[80]

The owner can bring usufruct into being, so in this sense he does indeed have causal usufruct. However, it is a question of virtual existence only because, as Summenhart had noted previously, in reality this (causal) usufruct is nothing but ownership or *dominium directum* itself.

4.2.3. *Use and enjoyment qualified*

Summenhart has now reached the point at which there is just one feature in the definition left to be discussed. This is the clause that imposes restrictions on or qualifications to the acts of using and enjoying a thing; these acts, he says, take place while "preserving the substance of the things." Summenhart continues by using the same method as before, i.e., a qualification based on a genuine observation of the juridical language. Like many late medieval theorists, Summenhart connects the phrase *salva rerum substantia* to a distinction in the possible objects of *usus* and *usufructus*. In speaking of *usus*, he remarks first, that there are things "the actual use of which is not their consumption, such as a house, a horse or a field," for after a person has used such a thing, the thing itself is not consumed, but remains, although long-term use will finally result in the thing's consumption. Second, there are also things the actual use of which is their consumption or is closely connected to their immediate consumption. As examples, Summenhart mentions things that are used up through eating and drinking; to eat or drink something is to consume it and leads to the corruption and transformation of the thing into another substance.

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[79] *Opus septipartitum*, q. 12, sig. E6v: "Alio modo prout non prescindit a proprietate, quo modo diceremus (etiam secundum dominos iuristas) habentem proprietatem alicuius rei etiam habere usufructum eiusdem, quia potest eadem uti et etiam frui, et ille ab eis dicitur causalis…"

[80] *Opus septipartitum*, q. 12, sig. E7r: "…quia habens proprietatem alicuius rei, habet eo ipso etiam virtualiter usufructum quia potest ratione proprietatis eius transfundere in alterum ius utendi et fruendi illa re."

Money also belongs to consumable things, since "the natural use and use of money *per se* is spending it, for money is purposefully (*finaliter*) invented to be the medium for the commutation of things that are necessary for living."[81]

Summenhart understands the description "preserving the substance of the things" with respect to the distinction between consumable and non-consumable things. This leads him to state that properly speaking, "it is required for *usus* that the things with respect to which a person has *usus* are not consumed by the actual use of these things, at least not right away, in the sense that their actual use would be their consumption or be closely connected to consumption." The point is that consumable things could not be objects of *usus* because it was simply not possible to use such things properly "preserving the substance of the things." Nevertheless, Summenhart claims relevance for the idea

[81] *Opus septipartitum*, q. 12, sig. E6r: "Tertia suppositio. Res quibus contingit homines uti, sunt duplices, quedam sunt quarum actualis usus non est earum consumptio, ut domus, equus, ager. Nam postquam quis est usus domo, equo, agro, vel securi, nondum est res consumpta, sed adhuc manet, quamvis diuturnus usus illarum rerum disponat tandem ad consumptionem. Alie vero sunt res quarum actualis usus est earundem consumptio vel coniunctam habet statim consumptionem. Exemplum, sicut sunt res comestibiles et potabiles. Nam usus earum est earundem comestio et bibitio, modo tales res comedere et bibere est easdem consumere, vel habet earum consumptionem statim annexam, quia eis comestis et bibitis sequitur earundem corruptio et transitus in aliam substantiam. Similiter est de pecunia. Nam usus naturalis et per se ipsius pecunie est eiusdem distractio, est enim finaliter adinventa, ut sit medium quo fiant commutationes rerum humano usui necessariarum, et ita finis eius est ut transferatur de uno in alium, que translatio est distractio, hec autem eius distractio est pecunie consumptio, non quidem essentialis vel substantialis, cum ipsa in materia et forma permaneat longo tempore quantumcumque distrabatur per multos, sed est eius consumptio quo ad habentem qui cum eam distrabat eam consumit quo ad se, quia amplius non retinet eius dominium. Et dixi notanter eius usus naturalis et per se est eius distractio. Nam eius usus accidentaliter sibi conveniens ad quem non fuit inventa, potest esse aliud quid quam distractio, puta si quis ad ostentationem et pompam vel gloriam exhibet eam oculis hominum, coram illis eam contrectando sine eius distractione, utitur quidem illa pecunia sine eius consumptione, sed talis contrectatio non est eius usus per se in quem finaliter est adinventa." Summenhart explains that when a person spends his money, he consumes it, not in an essential or substantial sense, but with respect to himself, because he no longer retains its ownership. He emphasizes that he deliberately says that the natural use of money or use *per se* is the spending of it, for money can be accidentally used in a way that it was not invented for and that differs from its spending. For example, someone may use money for ostentation by showing off money in front of others without spending it. This clarification shows that the distinction between consumable and non-consumable things is made on grounds of the natural use of things, by which is meant—in a teleological way—the use for which the thing was invented. Since Aquinas, the "consumptibility of money" was a central theme in the arguments against usury during the late medieval period. On this, see Langholm 1992.

that also in a more general or improper sense, the right of using things the use of which is their consumption can be called *usus*.[82] He does not, however, justify this view or verify it with references to juridical doctrines.

In applying a similar distinction to *usufructus*, Summenhart is able to employ the existing juridical terminology of his source texts extensively. He remarks that *usufructus* can be taken in the proper and in an improper sense. In the proper sense, *usufructus* "is constituted only in things the use of which is not their consumption." On this point Summenhart quotes Hostiensis's formulations pertaining to the "true usufruct" (*usufructus verus*), which "is constituted in *fundum rusticum* or *urbanum* in houses, slaves, mules, and other, also fruitless things." In an improper sense, Summenhart says, *usufructus* can be had with respect to things the use of which is their consumption, and he notes that in this sense, *usufructus* is called "quasi true" (*quasi verus*). Again he quotes Hostiensis, explaining that "for reasons of utility, it is accepted that *usufructus quasi verus* can be constituted in things that are consumed in use, as in money, wine, oil, grain, and other such things."[83]

As Summenhart's interpretation is based on the distinction between consumable and non-consumable things, this entails that the description "preserving the substance of the things" works primarily to rule out consumable things as objects of *usus* and *usufructus*. He recognizes, though, that as far as non-consumable things are concerned,

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[82] *Opus septipartitum*, q. 12, sig. E6r: "Quarta suppositio. Capiendo usum pro iure utendi etiam in legali acceptione adhuc accipitur dupliciter. Uno modo proprie: ut sic ad usum requiritur quod res respectu cuius quis habet talem usum, non consumatur per eius actualem usum, saltem statim, sic quod eius usus actualis sit eius consumptio vel annexam habeat consumptionem de proximo. Alio modo generalius, ut etiam se extendit ad impropriam acceptionem, quo domo etiam ius utendi re cuius usus est eius consumptio dicitur usus."

[83] *Opus septipartitum*, q. 12, sig. E7r: "Octava suppositio. Sicut usus captus pro iure utendi etiam prescindente a proprietate fuit captus dupliciter, ut in quarta suppositione, ita etiam usufructus captus pro iure utendi et fruendi etiam prescindente a proprietate. Nam capitur aliquando proprie, et sic non consistit nisi in rebus quarum usus non est earundem consumptio, et ille usufructus vocatur verus et de illo hic loquimur, unde constituitur in fundo rustico et urbano in edibus et servis et iumentis et ceteris rebus etiam sterilibus. Alio modo improprie prout etiam ius utendi et fruendi rebus quarum usus est earum consumptio dicitur usufructus, et sic non capitur hic, et ille dicitur quasi verus. Unde utilitatis causa receptum est ut etiam in his que usu consumuntur constitui possit usufructus quasi verus, ut in pecunia, vino, oleo, frumento, et in similibus." See Hostiensis, *Summa aurea*, liber III, De pignoribus, 998.

the clause "preserving the substance of the things" can be understood to impose normative restrictions on use and enjoyment. Summenhart touches on this subject when he explains the definition of *usufructus*. He refers to Hostiensis's explanation of the qualification "preserving the substance of the things," and points out that this clause should not be taken to mean that the usufructuary should "exercise caution in regard to preserving the substance, as if cautiousness would follow from the reason or description of *usufructus*." However, Summenhart says, following Hostiensis's interpretation, that the clause "preserving the substance of the things" could be taken to mean "provided that the substance is not destroyed, as if one would say, that so should one use and enjoy that the substance of the thing is not consumed." As a final comment, Summenhart says that if Hostiensis's solution does not satisfy, then the clause "preserving the substance of the things" should be understood to mean that *usufructus* consists in things the use of which is not their consumption.[84]

4.2.4. Usus *and* usufructus *as relations*

In describing *usus* as the right of exercising the act of using things, Summenhart presents his concept of a right as a relation. After demonstrating the difference between *usus* as a right and as fact, he refers to his discussion of *ius* in Question 1 and notes that *usus* as a right "is formally a relation, as a right is a relation." On this point he refers to the definitions of *usus* and *usufructus*, stating that "right" is the genus for *usus* and also for *usufructus*.[85] In the definition of *usus*, the genus is followed by two terms: "using" and "things." both of which specify the genus of *usus*. Summenhart explains these in the following way:

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[84] *Opus septipartitum*, q. 12, sig. E7v: "Quarto dicitur salva rerum substantia, quia in rebus usu consumptibilibus nunquam constituitur usufructus proprie captus, nec debet illa ultima clausula sic intelligi, salva rerum substantia, id est prestita cautione de salvanda substantia, quasi cautio sit de ratione et descriptione usufructus, quia non est de ratione vel quiditate usufructus quod prestetur cautio. Sed sic debet exponi secundum Hostiensem, id est dummodo non pereat substantia quasi diceret, ita debet uti et frui quod non consumat substantiam rei, vel si hoc non placet exponatur sic, salva etc. id est usufructus consistit in rebus quarum usus non est earum consumptio." See Hostiensis, *Summa aurea*, liber III, De pignoribus, 995.

[85] *Opus septipartitum*, q. 12, sig. E5v: "…et hoc secundo modo usus est res permanens, et est formaliter quedam relatio, sicut et ius est relatio, capiendo ius ut captum fuit in prima questione, quo modo est genus ad usum et usufructum, et hoc modo capitur hic quando diffinitur."

> Secondly is said "using," and thirdly is said "things." In these two clauses the two-fold terminus of the defined is mentioned, for when the defined is a relation—since it is formally a right and a right is a relation—it is fitting to describe the defined by its terminus. But this (speaking of the proximate terminus) is the actual use, and the thing concerning which such actual use is exercised is its remote terminus. Whence, from the fact that a person has *usus*, that is, the right of using a thing, he has a habitude that is terminated at that thing as to the remote terminus, and at the actual use as to the proximate [terminus].[86]

Here, Summenhart straightforwardly applies his definition of a right as a relation, which distinguishes a right with two termini from the subject and the foundation of the relation. Accordingly, "*usus* as a right" is a relation, which has "*usus* as fact" as the proximate terminus and the thing that is used as the remote terminus.[87]

Summenhart's interpretation of *usus* and *usufructus* as a relation leads him into conflict with his sources. After having clarified the object of usufruct as "another's things," Summenhart raises the question of the subject of usufruct. Where is this entity called *usufructus* considered subjective? He replies that the usufruct is "subjectively" in the very person who is the usufructuary, "for it is in that which is denominated by it, as a relation is in its foundation or subject." On this point, Summenhart remarks that one could argue that usufruct is subjective in "the thing towards, over which or of which one has the usufruct." He notes that this idea could be derived from the formulations in the *Digesta* (Dig. 7.1.2) and also in the *Institutes*, which specify that usufruct "is a right in a material object (*ius in corpore*), and if the object is destroyed, then the usufruct is also destroyed."[88]

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[86] *Opus septipartitum*, q. 12, sig. E6r: "Secundo dicitur utendi. Tertio dicitur rebus, in quibus duabus clausulis tangitur duplex terminus diffiniti, cum enim diffinitum sit relatio, quia est formaliter ius, ius autem est relatio, congruebat diffinitum describere per suum terminum. Ille autem (loquendo de proximo termino) est actualis usus, sed res circa quam talis actualis usus exercitur, est terminus eius remotus, unde eo ipso quod quis habet usus, id est ius utendi aliqua re habet habitudinem que terminatur ad rem illam ut ad terminum remotum, et ad actualem usum tanquam ad propinquum."

[87] For Summenhart's definition of right as a relation, see chapter 2.3. above.

[88] *Opus septipartitum*, q. 12, sig. E7v: "Et si queras, ubi est subiective illa entitas que vocatur usufructus. Respondetur est in ipso homine usufructuario, nam est in illo quod denominatur per eam, sicut relatio est in suo fundamento vel subiecto. Et si dicatur usufructus est ius in corpore quo sublato etiam ipsum tolli necesse est, ut ff, eo, l. i, et institu. eo, in princi. et per corpus intelligit res ipsa cuius vel circa quam quis habet usufructum."; D 7.1.2.: "Est enim usus fructus ius in corpore, quo sublato et ipsum tolli necesse est."; Inst. 2. 4.: "Est enim ius in corpore: quo sublato et ipsum tolli necesse est."

This view was also held by Hostiensis who explained the expression *ius in corpore* by saying that usufruct is "a form that inheres in the material object."[89] Summenhart does not make any explicit reference to Hostiensis's interpretation, although it has clearly motivated his discussion here. Yet Summenhart refutes Hostiensis's interpretation. According to Summenhart, the phrase *ius in corpore* should not be "understood to mean that usufruct would be formally and inherently in that thing, because then it would be in two subjects, for it has already been shown that it is in the usufructuary." Further, he adds that usufructus does not denominate the thing, which is the object of usufruct. What it denominates is the usufructuary, as Summenhart noted above.[90]

4.2.5. *The relation between* usus *and* usufructus

In light of these definitions, the difference between *usus* and *usufructus* culminated in the acts of using and enjoying a thing. What are these acts and how do they differ? In discussing *usufructus*, Summenhart elaborates with an explanation that is motivated by theological discourse. He points out that in the present context, the acts of use and enjoyment should not be understood in the same sense as in the first book of the *Sentences* (distinction 1). He explains that in such a theological context, the acts of use and enjoyment mean the acts of will "by which the will inheres in a thing in loving it, either for the sake of another (which is called the act of using) or for the sake of the thing itself (which is called fruition)." By contrast, in the present context the acts of use and enjoyment signify "external acts, which are meant to be exercised with respect to certain things."[91]

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[89] Hostiensis, *Summa aurea*, liber III, De pignoribus, 995: "Vel dic ius in corpore, id est, forma corpori inhaerens…"

[90] *Opus septipartitum*, q. 12, sig. E7v: "Et si queras, ubi est subiective illa entitas que vocatur usufructus. Respondetur est in ipso homine usufructuario, nam est in illo quod denominatur per eam, sicut relatio est in suo fundamento vel subiecto. Et si dicatur usufructus est ius in corpore quo sublato etiam ipsum tolli necesse est, ut ff, eo, l. i, et institu. eo, in princi. et per corpus intelligit res ipsa cuius vel circa quam quis habet usufructum. Respondetur, non debet intelligi quod sit formaliter et inhesive in tali re, quia tunc esset in duobus subiectis, quia iam probatum est quod sit in usufructuario. Item non denominat ipsam rem circa quam usufructus habetur, igitur."

[91] *Opus septipartitum*, q. 12, sig. E7r: "Septima suppositio. Quod hic non capiuntur actus utendi et fruendi illo modo quo in primo sententiarum, distinctio prima capiuntur quomodo sunt actus voluntatis eliciti quibus voluntas amando inheret alicui rei scilicet vel propter alterum qualis est actus utendi, vel propter se, qualis est fruitio.

> Taken in this sense, the acts of using and enjoying differ, because somebody is said to be able to use a thing (in this sense) when he can exercise this act—which is meant to be exercised in regard to the thing—precisely for his own utility, or [he] can direct the utility of this thing to himself only. Whereas he is said to enjoy the thing when he not only can exercise this act in regard to the thing for his own utility, but in addition can direct the same utility to another person. Examples of this will follow later.[92]

As defined in terms of utility, the difference between *usus* and *usufructus* appears clear in principle. In legal practice this difference is not always self-evident but requires further definition, as the examples that Summenhart introduces demonstrate. To clarify the difference, Summenhart presents three examples that are borrowed almost verbatim from Antoninus's *Summa*. The examples begin with a simple case and proceed to more complicated and less obvious cases. In the first example, *usus* and *usufructus* are exercised in regard to a rose garden. Summenhart explains that the holder of *usus* is limited to picking roses and flowers for his own use. "If, however, the usufruct is delivered to you, you can donate and sell roses and flowers or keep these for your own use also." The second example pertains to a kitchen garden. In this case, the holder of *usus* is limited to taking vegetables from the garden, but no more than are necessary for daily use. "But if you are conceded the *usufructus* of the garden, you can use these vegetables by yourself and also sell and donate them to others." The third example is a flock of sheep. Here, the holder of *usus* is limited to using the flock to fertilize in his own field. "But if I have given to you the usufruct of my flock, then you may not only fertilize your own field, but also

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Alioquin nullus homo diceretur habere ius fruendi quacumque creature, quia nullus homo habet ius diligendi aliquam creaturam propter semet ipsam cum perversissimum sit frui creaturis sic capiendo frui, et per consequens nullus habet ius id agendi, sed capiuntur hic pro actibus etiam exterioribus qui nati sunt exerceri circa aliquas res…" Summenhart points out that in the theological sense no human being is said to have right of enjoying another creature. This is a direct reference to the Augustinian principle, according to which only God could licitly be loved for His own sake (*fruitio*), whereas created things could be loved licitly for the sake of God (*uti*) and thus as a means to aspire the proper fulfilment of human existence. See Augustine, *De doctrina christiana libri quatuor*, lib.1, cap. 4.

[92] *Opus septipartitum*, q. 12, sig. E7r: "…et illo modo actus utendi et fruendi differunt, quia tunc dicitur quis in proposito posse uti aliqua re quando actum natum exerceri circa eam exercere potest dumtaxat in sui utilitatem, seu utilitatem illius rei in se solum convertere. Sed tunc dicitur frui eadem quando non tamen illum actum exercere potest circa eam in sui utilitatem, sed etiam potest utilitates eiusdem convertere in alterum, exempla autem postea patebunt de super."

another's, and not only fertilize, but also take wool and milk from my flock, and not only for your own use, but also to sell or donate to others and not only wool and milk, but also the offspring of the flock." This is because "in mules, sheep, and generally in all irrational animals, offspring are counted among the fruits."[93]

Summenhart follows Antoninus in adding a further qualification concerning usufruct over rational animals. He remarks that the offspring of slave women do not pertain to the usufructuary; indeed, "if I conceded to you the usufruct of my slave women, you could not take her offspring, either for yourself or for donating or selling that person to others, although you could turn the work of the slave women to your utility and concede her work to others by renting." Summenhart emphasizes that there is a reason for the difference between rational and irrational animals in this respect because "nature considers it absurd that man should be as a fruit, that is, counted as fruit, or to be called a fruit, when nature prepares all fruits for the grace of man." This remark is another quotation from Antoninus's text, to which Summenhart adds that "this reason does not militate among theologians, since even Christ is called the fruit of the womb of the blessed virgin"[94]

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[93] *Opus septipartitum*, q. 12, E7r: "Et hec differentia usus et usufructus declaratur tribus exemplis. Primum si tamen usus viridarii sit tibi relictus, rosas et flores viridarii poteris carpere ad usum tuum, sed alteri non poteris vendere aut donare. Sed si usufructus sit tibi relictus, poteris rosas et flores alteri donare vendere et etiam ad usum tuum retinere. Secundum si in aliquo orto sit tibi legatus tamen usus, poteris quidem uti oleribus orti ad tuum usum quotidianum, non autem ultra quam tibi necessarium sit capere nec alteri de oleribus illius orti vendere vel donare, sed si quis tibi concessit usufructum orti, poteris uti illis oleribus pro te et etiam aliis vendere et donare. Tertium exemplum. Si tibi concessi usum gregis mei, poteris quidem grege meo uti ad stercorizandum tamen, sic quod non poteris capere lac, lanam vel fetum gregis, immo nec poteris stercorizare nisi agrum tuum. Sed si tibi concessi usufructum gregis mei, poteris non solum stercorizare agrum tuum, sed etiam alterius et non tamen stercorizare, sed etiam capere lanam, lac gregis mei, et non tamen pro te sed etiam alteri illa vendere vel donare et non tamen lac et lanam, sed etiam fetum gregis, quia in iumentis et pecudibus et generaliter in quolibet animali irrationali fetus computatur in fructum, secus autem in animali rationali, puta in ancillis."

[94] *Opus septipartitum*, q. 12, E7v: "Nam fetus vel partus ancille non pertinet ad usufructuarium, adeo quod si tibi concessi usufructum ancille, non ob id poteris partum eius capere, sive pro te sive illum alteri donando vel vendendo, licet possis operas ancille convertere in tuam utilitatem atque aliis illas operas concedere locando. Et ratio diversitatis est inter animalia rationalia et irrationalia, quia natura extimavit absurdum quod homo deberet esse in fructu id est computari pro fructu, vel dici fructus cum natura omnes fructus gratia hominis comparavit, hec tamen ratio non militaret apud theologos cum etiam Christus dicatur fructus ventris beate virginis."

Summenhart also clarifies the relationship between *usus* and *usufructus* with the aid of a separate counter-argument that takes into account that the definition of *usus* is in fact included in the definition of *usufructus*. From this it follows that *usus* can be universally predicated of *usufructus*, and in that sense every *usufructus* is *usus*. This is an inappropriate conclusion, however, because *usus* and *usufructus* are meant to be distinct and different.[95]

Summenhart's reply is based on the observation that *usus* is taken or understood in two senses, with and without the separation or exclusion of enjoyment. He concludes that when *usus* is considered without excluding enjoyment, *usus* can truly and universally be predicated of *usufructus*, as the argument claims. In this sense *usus* does not differ from *usufructus* as one species from another, but rather as genus from its species. In this sense, *usufructus* includes *usus* as its genus (as "man" includes "animal"), and therefore, everyone who has the *usufructus* of a thing also has the *usus* of that thing.[96] Summenhart verifies this usage of *usus* with a reference to juridical language. He says that this interpretation is in agreement with the opinion of the master jurists who say that if someone is bequeathed *usufructus* without *usus*, this legacy amounts to nothing, because there is a contradiction in the terms involved in the legacy. And the contradiction is not based on anything other than the fact that this is a necessary consequence: a person has *usufructus*; therefore, the person has *usus*. Further, Summenhart continues, lawyers maintain that if one person entrusts full *usufructus* to another and afterwards revokes *usus*, then the legacy is valid because of its *bonum initium*, but the revocation is said to be

[95] *Opus septipartitum*, q. 12, sig. E7v: "Primo arguitur sic. Ex descriptione usufructus sequitur quod usus posset universaliter predicari de usufructu, ut illa sit vera, omnis usufructus est usus, quia descriptio usus potest universaliter predicari de descriptione usufructus. Nam illa est vera, omne ius utendi et fruendi alienis rebus salva rerum substantia est ius utendi alienis rebus salva rerum substantia, consequens autem est inconveniens, quia usus et usufructus distinguuntur et differunt."

[96] *Opus septipartitum*, q. 12, sig. E7v: "Dicendum quod usus etiam captus ut prius descriptus est capitur vel consideratur dupliciter. Uno modo sine precisione vel exclusione fructus, et sic vere et universaliter predicatur de usufructu, ut probat argumentum, nec hoc modo capiendo usum differt usus ab usufructu, ut species a specie vel disperatum a disperato, sed tamen ut genus a sua specie, quia tunc usus est genus ad usufructum, sicut animal ad hominem, unde tunc usufructus includit usum sicut homo includit animal, ideo omnis habens usufructum alicuius rei, habet etiam usum eiusdem."

invalid.[97] Here, the authoritative reference is *Digesta* 7.8.14.1, although Summenhart borrowed the reference itself directly from Antoninus's *Summa*.[98] Summenhart's insistence that *usus* is related to *usufructus* as genus is to species cannot be found in these source texts, but it is his way of solving the problem mentioned by the counter-argument.

Summenhart maintains that when *usus* is considered along the exclusion or separation of enjoyment, it is distinguished from *usufructus.* In this sense neither term is truly predicated of the other. He notes that in the same way, if by "animal" was understood "that which has no other soul but sensitive," animal would not be truly predicated on man nor man on the animal. Summenhart verifies this usage of *usus* in the juridical language by concluding that lawyers call this *usus* bare use (*usus nudus*), "not by denuding one of the right of using but by denuding one of the right of enjoying." (Dig. 7.8.1)[99]

4.2.6. *Usufruct vs.* dominium utile

Summenhart's analysis of usufruct touches on the question of the conceptual relationship between usufruct and *dominium utile*. The concept of *dominium utile* was a creation of medieval jurisprudence and had its origin in the feudal legal system. Insofar as it is plausible to speak of ownership or property in the feudal context, it can be said that the ownership of land was thought to be divided between the lord and his vassal. In Roman law *dominium* was indivisible in its scope and extent, which made the Roman concept of *dominium* unsuitable for the legal purposes of feudal society. Medieval lawyers

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[97] *Opus septipartitum*, q. 12, sig. E7v: "Et huic concordat quod dicunt domini iuriste dicentes. Si alicui legatur usufructus deducto usu, nihil valet legatum, quia verba repugnantia reperiuntur in legato. Ista autem repugnantia non est ex alio nisi quia de necessitate sequitur. Ille habet usufructum, ergo habet usum, veruntamen (sicut ipsi dicunt) si aliquis simpliciter legavit usufructum, et postea ademit usum, valet legatum quia habuit bonum initium, sed tamen ademptio dicitur nulla."

[98] See Antoninus of Florence, *Summa theologia*, part III, chap. 3, sig. F3r.

[99] *Opus septipartitum*, q. 12, sig. E7v: "Alio modo consideratur vel capitur cum exclusione seu precisione fructus, ita quod usus est tamen usus id est est ius tamen utendi rebus etc. et sic distinguitur ab usufructu adeo, quod unum non vere predicatur de alio, quia si tunc diceretur usufructus est usus, sensus esset, usufructus est tamen usus, id est, est ius tamen utendi et per consequens non fruendi, et sic usufructus non esset usufructus quod implicat, sicut si animal caperetur pro illo quod tamen habet animam sensitivam, non vere diceretur de homine nec econtra homo de animali. Et usus hoc modo captus vocatur a dominis iuristis usus nudus, non per denudationem a iure utendi sed per denudationem a iure fruendi."

complemented the text of *Corpus Iuris Civilis* with the invention of the concept of *dominium utile*. *Dominium* was understood as being divided into *dominium directum*, which signified the lordship of the upper lord, and *dominium utile*, which signified the vassal's lordship.[100] Although the concept of *dominium utile* came to be widely used in medieval legal discourse, it was not accepted without criticism. A particular problem and one that spawned legal disputes was the relationship between *usufructus* and *dominium utile*. How do they differ?

Summenhart approaches this question with the aid of a counter-argument that contests the validity of the definition of usufruct for the very reason that the definition applies to *dominium utile*, which is taken to be distinct from *usufructus*. The claim that the definition of *usufructus* is applicable to *dominium utile* is proven with a reference to the title of *emphyteusis*. *Emphyteusis* was a Roman concept for a long-term lease of land. In Roman law *emphyteusis* was classified as usufruct, but medieval lawyers generally took it as an example of *dominium utile*.[101]

According to the counter-argument, the *emphyteuta* has the right of using and enjoying that estate, which he has accepted under *emphyteusis*, because "he can take its fruits for his own utility and also distribute these according to his discretion, by selling and donating." Further, the land that the *emphyteuta* holds by *dominium utile* is classified as "another's thing." "It is not his through ownership, because then he would have *dominium directum*, and not *utile*." As the final point, which makes the concordance with the definition complete, it is noted that the substance of an estate remains intact when it is used or enjoyed under *emphyteusis*.[102]

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[100] Feenstra 1989, 112. For the distinction between *dominium directum* and *dominium utile* in detail, see Feenstra 1971.

[101] Feenstra 1989, 113. In the legal relation of *emphyteusis* land was granted in perpetuity or for a long period of time against an annual rent. The holder of *emphyteusis*, the *emphyteuta*, was entitled to do virtually anything that the owner could have done, that is, as long as he paid the rent. A feature that differentiated *emphyteusis* in a significant way from the other leases, e.g., from the usufruct (*usufructus*), was that *emphyteusis* was inheritable and freely alienable. The reception of the title of *emphyteusis* into private law came too late to affect the indivisibility of *dominium* in the legal theory, but it contributed to the later applicability of Roman law to the medieval feudal system. For *emphyteusis* in Roman law, see e.g., Thomas 1976, 142, and Nicholas 1962, 148–149, 157.

[102] *Opus septipartitum*, q. 12, sig. E8r: "Secundo arguitur. Illa descriptio convenit dominio utili, sed dominium utile distinguitur ab usufructu, igitur convenit alteri a diffinito. Maior probatur, quia dominium utile est ius utendi et fruendi alienis rebus,

The claim that *dominium utile* is distinct from *usufructus* is proven with a reference to the common opinion that "no one says that the usufructuary is *dominus* of the thing he holds under *usufructus*." Further, the argument claims that "the person who is *dominus* or has dominion of a thing can sell and distribute the substance of the thing, but the usufructuary cannot under any circumstances sell or distribute the substance of the thing, although he can sell the fruits." On the last point of difference, the argument refers to Hostiensis's view, according to which the usufructuary cannot sell his right, unlike the holder of *dominium utile*.[103]

Summenhart develops two solutions to this dilemma. The first is to refuse to accept the concept of *dominium utile* altogether. Summenhart traces this solution back to Hostiensis's teacher (who was probably Jacobus Balduini (d.1235)). Summenhart reports that in his *Summa* (in the chapter *De feudis*), Hostiensis discussed the question of whether the vassal can be said to possess *dominium utile*. According to Summenhart, Hostiensis did not actually solve the question *pro vel contra*. Summenhart reports that Hostiensis was ready to admit that the vassal can be said to have *dominium utile*, but then he concluded that "my teacher says that *dominium utile* is a chimera."[104]

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salva earum substantia. Probatur exemplariter per singulas clausulas. Nam dicimus emphiteotam habere dominium utile illius terrule quam accepit in emphiteosim, et in eo quod habet eius dominium utile habet ius utendi illa terrula atque fruendi, quia fructus eiusdem terrule potest capere in sui utilitatem et cum hoc eosdem prout voluerit distrahere vendendo vel donando. Item etiam terrula talis est dicenda res aliena respectu ipsius, quia non est sua per proprietatem, qui tunc haberet dominium directum eiusdem, quod est falsum, quia illud maned apud dominum. Similiter illa terrula salva manet in substantia quando ea utitur vel fruitur."

[103] *Opus septipartitum*, q. 12, sig. E8r: "Minor autem probatur, quia nemo dicit usufructuarium esse dominum rei cuius habet usufructum, et tamen si esset idem cum dominio utili, ipse deceretur etiam dominus rei. Item qui est dominus vel habet dominium rei potest eandem rem in substantia vendere et distrahere. Modo usufructuarius nunquam potest rem ipsam in substantia vendere vel donare, licet fructus eius possit vendere, immo etiam usufructuarius non potest vendere ius suum scilicet ipsum usufructum secundum Hostiensem."

[104] *Opus septipartitum*, q. 12, sig. E8r: "Dicendum ad hoc argumentum per duas solutiones. Prima est, negando presuppositum quod sit aliquod dominium utile in rerum natura, unde non debet dici quod emphiteota vel vasallus habeat dominium utile in re emphiteotica vel feudali, et sic non convenit diffinitio alteri a diffinito. Antecedens videtur fuisse illius quem Hostiensis vocat suum dominum. Nam Hostiensis in summa in titulo de feudis in capitulo quod ius acquiratur vasallo, movet inter alia talem questionem, utrum vasallus habeat dominium in re, saltem dominium utile, et arguit ibi quod sic, postea in contrarium, tandem non soluendo argumenta pro vel contra, dicit. Quicquid tamen superius allegatum sit, satis videtur posse dici quod

Summenhart does not find this first solution entirely satisfactory. He points out that the concept of *dominium utile* is widely recognized in juridical discourse in which it is taken to be distinct both from *usufructus* and *dominium directum* or *proprietas*. Therefore, he develops the first solution further. Summenhart maintains that it is possible to accept the first solution as true and yet maintain that there is a certain distinction between *dominium utile* and *usufructus*. He argues that if *dominium utile* were intrinsically or *quiditative* some other right than *usufructus*, then *dominium utile* would be nonsense.[105] This is because an *emphyteuta* and a vassal

> …have a right of using and enjoying the emphyteutical or feudal property and not of doing anything else, because they do not have ownership. And they would have the same right and no more (as far as the intrinsic reason is concerned) if they were usufructuaries with respect to these things. Therefore, if *dominium utile* is to be something, then it is *dominium* improperly speaking, so that intrinsically it is nothing more than *usufructus*, but is properly distinguished from *usufructus* in extrinsic circumstances.[106]

According to Summenhart, there are many kinds of extrinsic characteristics that correspond to the many and diverse modes in which various vassals and *emphyteota* have *dominium utile*. As an example, he says that the holder of *dominium utile* can sell the right itself in addition to the products of the thing, whereas the holder of the common title *usufructus* can only sell or distribute the products of the thing. As another example, Summenhart refers to the exposition of

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habeat utile dominium, et addit dicens. Sed dominus meus dicit quod utile dominium est chimera." For the dispute around *dominium utile*, see Tuck 1979, 15–17.

[105] *Opus septipartitum*, q. 12, sig. E8r: "Ne tamen recedatur a modo loquendi communi ponentium aliquod dominium esse utile tamen, distinctum a directo et etiam ab usufructu, posset poni secunda solutio per quam posset etiam dictum illius prime solutionis habere veritatem, et cum hoc dici quod esset aliqua distinctio dominii utilis ab usufructu. Diceretur ergo sic, quod si dominium utile dicat aliquod ius quod intrinsece sit aliquod aliud ius quam sit usufructus, sicut dicit quid aliud a dominio directo seu proprietate, tunc dominium utile nihil est, quia utique non apparet quod illi de quibus dicere solemus quod habeant non precise usufructum, immo habeant utile dominium, puta emphiteota et vasallus habeant aliquod ius quod intrinsece sit et quiditative aliud ius quam haberent si essent usufructuarii."

[106] *Opus septipartitum*, q. 12, sig. E8r: "Habent enim ius utendi et fruendi re emphiteotica et feudali et non plus, quia non proprietatem, et hoc idem intrinsece et non amplius (quantum est de intrinseca ratione) haberent si essent tamen usufructuarii in illis rebus. Si igitur dominium utile debet esse aliquid, tunc illud dominium est improprie dictum dominium, ita quod intrinsece nihil est ultra usufructum, sed in extrinsecis circumstantiis bene distinguitur ab usufructu."

the canonist Panormitanus and says that "*dominium utile* is of longer duration than *usufructus*, whence in a long-term hire, *dominium utile* is transferred to the lessee, which does not take place in the short-term hire." Summenhart stresses that these differences do not express an intrinsic qualifying distinction, as whiteness of long duration is not distinguished by its species from the whiteness of one day.[107]

Summenhart concludes that it is not incorrect that the definition of *usufructus* corresponds to *dominium utile*. This is because the descriptions are given according to intrinsic characteristics, and intrinsically *dominium utile* is the same as *usufructus*, although they are extrinsically distinguished.[108] He suggests that the same conclusion could be reached with a physical or metaphysical argument, which rests on the concept of a right as a relation. He notes that "*dominium utile* and *usufructus* are nothing but relations, which are founded in man and ordered toward some useful thing." Further, as these relations have the same foundation and terms, the relations are the same, "because from the extremes we are to argue the distinction and identity of the relations." Summenhart acknowledges, however, that this argument could be refuted with a counter-example, because sometimes distinct relations can be found between the same extremes. As an example, he mentions the distinction and distance between two objects. According to him, these are examples of relations that belong to a different genus,

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[107] *Opus septipartitum*, q. 12, sig. E8r: "Hee autem circumstantie multe sunt secundum quod dominium utile multipliciter reperitur et diversis modis in vasallis et etiam in emphiteotis. Una autem circumstantia diversificans est. Nam tunc illud ius dicitur proprie loquendo dominium utile quando habens ipsum potest non tamen vendere fructum illius rei et distrahere, sed etiam ipsum ius potest vendere quomodo reperitur in emphiteota et vasallo, sed quando non potest illud vendere sed solum fructus tunc retinet sibi nomen commune scilicet usufructus. Item dominium utile est diuturnius usufructu, unde in locatione longi temporis transfertur dominium utile in conductorem, secus in locatione modici temporis prout vult Panormitanus in c. ex litteris, de iurepatronatus, sed illa non arguunt distinctionem intrinsecam specificam sicut albedo diuturna non distinguitur specie ab albedine unius diei." Summenhart says further that sometimes *dominium utile* is distinguished from usufructus by the fact that *dominium utile* is possessed on a permanent basis, whereas *usufructus* is possessed for a certain period of time. He notes, however, that this extrinsic circumstance does not distinguish *dominium utile* and *usufructus* universally, because both of these rights can be either temporal or permanent and extend to heirs. *Opus septipartitum*, q. 12, sig. E8v.

[108] *Opus septipartitum*, q. 12, sig. E8v: "Et per hoc solueretur argumentum. Dicendum enim quod non est inconveniens quod conveniat dominio utili, quia illud est intrinsece idem cum usufructu licet extrinsece distinguatur ab eo, descriptionis autem dantur secundum intrinseca. Item quod dominium utile quale dicitur vasallus habere nihil iuris addit ultra usufructum, quantum est de intrinseca ratione usufructus."

because the first is an intrinsically advenient relation, but the second is not.[109]

4.3. *Ownership* (proprietas) *and possession* (possessio)

In *Questio* 14, Summenhart addresses ownership (*proprietas*) and possession (*possessio*). Unlike the case of *usufructus* and *usus*, Roman law did not provide medieval discourse with any standard definition for *proprietas* or *possessio*. As mentioned earlier, Summenhart chose to approach *proprietas* and *possessio* through definitions that originally were composed by the glossator Portius Azo (c. 1190–1220) in the thirteenth century.[110] These definitions also appeared in Antoninus of Florence's *Summa* as well as in Hostiensis's *Summa*, both of which Summenhart relied upon as sources for his discussion. Summenhart begins his inquiry as follows:

> Whether the descriptions of ownership (*proprietas*) and possession (*possessio*) are put forward well by these statements: Ownership is the dominion

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[109] *Opus septipartitum*, q. 12, sig. E8v: "Posset etiam phisicum et methaphisicum argumentum ad idem adduci, quia tam dominium utile quam usufructus non sunt nisi relationes quedam fundate in homine in ordine ad aliquam rem utilem, modo ille relationes habent idem fundamentum et eundem terminum, igitur etiam ipse relationes sunt eedem, quia ex extremis solemus arguere distinctionem et identitatem relationum. Hoc tamen argumentum posset pati instantiam, quia aliquando inter eadem extrema reperiuntur distincte relationes etiam genere, ut distinctio de distantia inter a et b, quia prima est intrinsecus adveniens, secunda non." By an intrinsically advenient relation is meant a relation that follows by necessity of the existence of the extremes and the foundation. For the distinction between intrinsically and extrinsically advenient relations, see Broadie 2005, 17. As the final proof, Summenhart refers to the description of fief, which Hostiensis gave in his *Summa* (De feudis, c. 1.). According to Summenhart, the description of fief shows that it differs from usufruct in extrinsic charactistics. *Opus septipartitum*, q. 12, sig. E8v: "Aliter tamen etiam eorum distinctio patere potest ex descriptione feudi quam dat Hostiensis, in titulo de feudis capitulo primo, ubi sic dicit in secunda descriptione. Feudum est illud beneficium quod ex benivolentia alicuius ita traditur alicui quod proprietate eius rei que in feudum datur, remanente apud dantem, usus et usufructus eiusdem rei ita ad accipientem transeat ut ad eum heredesque suos masculos et feminas, si de eis nominatim dictum fuerit, imperpetuum pertineat ad hoc ut ipse sive eius heredes, fideliter domino serviant, sive illud servitium nominatim dictum fuerit a dominio quale esse debeat sive indeterminate sit permissum. Hec ille. Ex quibus verbis patet quod tantum superaddit aliqua extrinseca rationi usufructus. Unde arguitur sic. In vasallum transfertur usufructus quando sibi conceditur feudum, igitur est usufructuarius quantum est ex intrinseca ratione usufructus, licet aliqua superaddantur propter que accepit nomen vasalli relicto nomine usufructuarii."

[110] See Azo, *Summa*, VII Lib. Cod., Tit. XXXII, 729.

> of a thing, acquired in a just way; possession is the physical and mental detention of a corporal thing, by the intervening support of *ius*.[111]

Summenhart introduces the definitions successively, as he had done in the case of *usus* and *usufructus*, which implies that ownership and possession were connected legal concepts. This was the case in Roman law, which recognized, for example, possession as a foundation for ownership. Yet as will become apparent when examine these definitions closely, the relationship between ownership and possession appears different from that which prevailed between *usus* and *usufructus*. Ownership and possession do not have any common term; neither one can be derived from the other. There seems to be even a categorical difference between them: Ownership is defined juridically (as dominion), whereas possession seems to be defined by factuality (as detention). In this sense, the definitions correspond adequately to the Roman view, which was encapsulated in the lawyer Ulpian's famous phrase: "ownership has nothing in common with possession."[112] Like the majority of medieval theorists, Summenhart did not maintain any categorical distinction between ownership and possession in his discussion, but was inclined to treat both as rights (*iura in re*). Yet Azo's definitions dictated the general course of his discussion; despite introducing the definitions together and discussing ownership and possession under the same Question, Summenhart discusses ownership and possession in separate inquiries.

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[111] *Opus septipartitum*, q. 14, sig. F1r: "Utrum descriptiones proprietatis ac possessionis sint bene posite quibus dicitur. Proprietas est dominium rei iustis modis quesitum. Possessio est corporalis rei detentio, corporis et animi, iuris adminiculo interveniente."

[112] Dig. 41.2.12.1: "Nihil commune habet proprietas cum possessione." Classical Roman lawyers emphasized a categorical difference between ownership and possession. Ownership was seen as a legal relation, that is, a relation that was established by law. By contrast, possession was conceived as a factual relation with respect to a corporeal thing. The law did not establish possession; possession was a matter of fact. At the same time, however, the law recognized features that brought possession rather close to ownership in certain respects. One way to describe the Roman law conception of possession is to say that possession meant "the holding of a thing in the manner of an owner, the exclusive holding of a thing." Nicholas 1962, 111. In addition, although possession was a matter of fact, it was a normative matter of fact. Not everyone who happened to have the thing under his physical control deserved the status of possessor, but only the person who fulfilled the conditions established by law. The title of possession with its legal consequences was reserved for the legitimate factual possessor. For the relationship of possession and ownership in Roman law, see e.g., Thomas 1976, 133–150.

4.3.1. *Ownership as dominion*

Azo's definition described ownership as "dominion of a thing, acquired in a just way." As far as the validity of this definition is concerned, Summenhart places one condition on meaning of the term "dominion." In Question 1 Summenhart had sought to justify a broad sense of "dominion" that was equivalent to "right." Now, he maintains that this broad sense is out of place in the present context. He notes that if the term "dominion" is taken in the broad sense, then the definition of *proprietas* would fit *usus* and *usufructus* also, and "neither *usus* or *usufructus* is *proprietas*."[113] Therefore, Summenhart concludes that "the description of *proprietas* is good only if dominion is taken strictly as that *dominium* and *ius* that is *simpliciter ius in re*."[114] What he means by this is explained in the following way:

> Namely, a right (as we understand it, and as it was defined in Question 1) is divided as follows: a certain right is qualified (*secundum quid*) or imperfect, and a certain right is unqualified (*simpliciter dictum*) and perfect. The first one is such that the person who has it does not have the faculty precisely over the substance of the thing, so that he cannot consume this thing or dispose of it by selling, donating, or in other ways, but [he] still has a right to the use of the thing, so that he can take utility out of it, and this right has two species, viz. *usus* and *usufructus*. The second is such that the person who has it also has the faculty over the thing itself regarding its substance, so much that he can consume or dispose of the thing by selling and donating it to another, and that is called *proprietas*, and the definition of *ius* pertains to each one of these and is predicated of them univocally.[115]

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[113] *Opus septipartitum*, q. 14, sig. F1r: "Prima conclusio. Diffinitio proprietatis non esset bona, si caperetur dominium generaliter ut scilicet convertitur cum iure, quia tunc conveniret etiam usui et usufructui, nam utrunque illorum esset hoc modo dominium, id est ius rei iustis modis quesitum, et tamen nec usus nec usufructus est proprietas."

[114] *Opus septipartitum*, q. 14, sig. F1r: "Secunda conclusio. Descriptio proprietatis esset bona si caperetur dominium stricte pro eo dominio atque iure quod est simpliciter ius in re."

[115] *Opus septipartitum*, q. 14, sig. F1r: "Nam ius (ut hoc accipimus, sicut et diffinitum fuit questione prima) sic dividitur, quoddam est ius secundum quid vel imperfectum, et quoddam est ius simpliciter dictum et perfectum. Primum dicitur illud quod sic se habet quod habens ipsum non habet facultatem precise in rem ipsam quo ad sui substantiam, adeo quod nec potest illam rem consumere, nec distrahere vendendo, donando, et sic de aliis, sed tamen habet ius in usum ipsius rei, sic quod utilitatem eiusdem potest capere, et illud ius habet illas duas species, scilicet usum et usufructum. Secundum autem dicitur illud quod sic se habet quod habens ipsum habet facultatem etiam in rem ipsam quo ad eius substantiam, adeo quod potest illam rem consumere

Summenhart's point is that, strictly speaking, only ownership is a right in a thing (*ius in re*). *Usus*, as well as *usufructus*, is not a right in a thing, but only to its use. Nevertheless, *usus* and *usufructus* are rights in the full sense of the term, just as is *proprietas.*

4.3.2. *The just acquisition of dominion*

What does it mean that ownership should be "acquired in a just way"? Summenhart discusses this qualification with the aid of three counter-arguments. His discussion of the second counter-argument is especially interesting, for it grows into a general analysis of just acquisition as a criterion for ownership.[116] This argument concerns a prostitute's ownership of her salary. The argument is that a prostitute has ownership of the payment for prostitution, and yet the prostitute does not acquire payment in a just way, because she acquires it "through sin."[117]

Summenhart deals with the argument by making a distinction in the prostitute's activities. He points out that "the prostitute acquires the ownership of the payment through unjust action, namely, by

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vel distrahere, eam vendendo et donando alteri, et illud vocatur proprietas, et cuilibet illorum convenit descriptio iuris et univoce de eis predicatur…"

[116] The first counter-argument held the usurer's ownership of the usurious profit, and it was conditioned by the special circumstances of alms giving. It was argued that, although the usurer has not acquired the usurious profit in a just way, he nevertheless can dispose of the thing that is acquired by an usurious loan provided he does not make himself impotent to restitution. This is taken to prove ownership. In his reply, Summenhart maintains that the ownership of a thing cannot be inferred from the action that a person can exercise with respect to a thing under special circumstances. The reasoning that "this person can alienate that thing; therefore, he has ownership in that thing" is a *non sequitur*. According to him, even a robber can sometimes alienate the things robbed. Summenhart adds, "the usurer cannot alienate the usurious thing, nor can the thief." *Opus septipartitum*, q. 14, sig. F1v. The third counter-argument is of a formal nature with an explicit reference to sophistic disputations. It states that the expression "acquired in a just way" is a redundancy (*nugatio*). This is because a just acquisition is characteristic of dominion by definition. Thus, the point is that if in the definition of *proprietas* the term dominion is replaced by its definition, then the characteristic of a "just acquisition" is stated twice, which counts as a redundancy. Summenhart's reply to the claim of *nugatio* derives directly from logic. He remarks that the expression "acquired in a just way" is placed in the definition "for greater explication." Therefore, it is not a redundancy. *Opus septipartitum*, q. 14, sig. F1v: "Dicendum quod illa clausula ponitur ad maiorem explicationem nec illa additio inducit nugationem qui tollatur per illam regulam. Equivalens geminis etc." For *nugatio* in a standard book of logic, see e.g., Peter of Spain, *Tractatus*, p. 94–95.

[117] *Opus septipartitum*, q. 14, sig. F1v: "Secundo arguitur, meretrix habet proprietatem in precio meretricii, et tamen descriptio non convenit illi eius proprietati, quia non iustis modis quesivit eam, quia per peccatum."

fornication, but not through unjust acceptance, that is, she does not sin in accepting the payment."[118] In other words, although the prostitute sins by prostituting, she does not commit an injustice by accepting her customer's money. Summenhart concludes:

> Therefore, it suffices for saving the definition that *dominium* is acquired by a reception that is not unjust or that law does not oppose that reception, and so it is the case in the reception of the payment for prostitution, because divine law and human law do not oppose the reception, although divine law opposes fornication by which one receives [the payment].[119]

This passage contains several interesting points. The distinction between the acts of prostitution and receiving payment was derived from Roman law and was made by many medieval theorists, for example, by Thomas Aquinas.[120] How does Summenhart understand the criterion "acquired in a just way"? He suggests that the term "just" means "not prohibited by the law." Further, the term "law" covers divine law, and not only human or civil law. Taken together, all this means that the requirement of "just acquisition" is a moral condition where "just" means "not prohibited" or "licit." As such, the requirement is not very severe, at least, not in the prostitute's case; it suffices that there is no law that prohibits the prostitute from accepting the sum of money given to her by the customer.[121]

Summenhart's analysis of the prostitute's case concentrates on the question of the legitimacy of the institution of private ownership and

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[118] *Opus septipartitum*, q. 14, sig. F1v: "Respondetur licet meretrix acquisiverit proprietatem precii per actum iniustum scilicet per fornicationem, non tamen per acceptionem iniustam, hoc est, accipiendo precium non peccavit, licet id pro quo accepit fuerit iniustum…"

[119] *Opus septipartitum*, q. 14, sig. F1v: "…sufficit igitur ad salvandam diffinitionem quod dominium sit acquisitum acceptione que non sit iniusta seu cui acceptioni non resistit lex, et sic est in acceptione precii meretricii, quia acceptioni non resistit lex divina nec humana, licet fornicationi pro qua accepit resistat lex divina."

[120] Aquinas introduced the distinction in describing prostitution as an example in which one may give alms from ill-gotten goods. See his *Summa Theologiae* 2a2ae, q. 32, a. 7. In this context, it became customary to contrast prostitution with usury. See Baldwin 1970, 133–137.

[121] Summenhart's view is that in this respect prostitution differs from usury, for receiving payment from the loan of money is explicitly prohibited by divine law. *Opus septipartitum*, q. 14, sig. F1v: "Contrarium est in usurario, nam actui pro quo accipit scilicet actui mutuandi non resistit lex…sed acceptioni incrementi pro eodem actu resistit lex divina prohibens receptionem…"

not on the legitimacy of a person's actions or profession. He defends his approach as follows:

> Therefore, if the ownership required that not only the reception of a thing is just, but also all the previous acts are just, then it would follow that salesmen who are selling their things during prohibited days would not acquire ownership for the price paid, no matter how moderate, because they would acquire it through sin. The same would be true when they sell with lies and perjuries, even though at a moderate and just price.[122]

The apparent point underlying Summenhart's account is that it would not be wise to set strict normative or moral requirements on the validity of ownership. The quality of an individual's moral action is another, separate question with different norms.

4.3.3. *A causal description of possession*

The basic ingredient in Summenhart's interpretation of possession is the idea of possession as a right. In describing how *usus* and *usufructus* are related to possession in *Questio* 13, he explains that *usus, usufructus*, and *possessio* are parallel (and not subordinate) species of the same genus. Possession, according to Summenhart, "is a right, for whoever possesses a thing in a just manner has a kind of right in that thing, namely, the right of detaining it."[123] Against this background it may seem unexpected that in the next *Questio* his starting point is Azo's definition of *possessio*, which appeared to locate possession primarily in the realm of fact rather than in the realm of right: "Possession is physical and mental detention of a corporal thing, by the intervening support of *ius*."[124]

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[122] *Opus septipartitum*, q. 14, sig. F1v: "Unde si requireretur ad proprietatem quod non solum acceptio rei esset iusta, sed etiam omnes actus previi essent iusti, sequeretur quod mercatores vendentes diebus prohibitis merces, non acquirerent proprietatem in precio earundem, etiam quantumcumque moderatum acciperent, eo quod mediante peccato acquirunt illud. Idem sequeretur de eisdem quando cum mendaciis et periuriis venderent etiam pro moderato et iusto precio."

[123] *Opus septipartitum*, q. 13, sig. F1r: "Quartum dictum, usus et usufructus se habent ad possessionem, etiam sicut species distincte, non subalternatim posite sub eodem genere. Nam omnia illa tria sunt species iuris, ponitur enim in descriptionibus omnium illorum trium ut patuit de primis duabus et de possessione patebit in sequenti questione. Unde et possessio est quoddam ius, qui enim iuste possidet aliquam rem, habet ius aliquale in illa re scilicet ius eam detinendi."

[124] Summenhart's habit of using Antoninus's *Summa* as his guide to legal terminology partly accounts for his choice of definition. However, it is also true that by using

In fact, Summenhart recognizes that this definition is in need of some explanation. In terms of scientific language, one could ask that if possession is a species of right, then should "right" and not "detention" be the genus term in the definition?[125] Summenhart's answer rests on a distinction between the formal and the causal descriptions. He points out that in a formal description, the genus term should be posited as the first part of the definition, but in a causal description, it should not. Therefore, when possession is described as detention, this should be read as a causal description or predication. As such, it tells how possession is acquired, but not what possession is. This causal predication "is resolved into a formal description in this way: it is a right that is acquired by detention."[126]

As a causal description, Azo's definition does not directly explain how possession is retained. Summenhart explains that possession is retained in the way it is acquired, that is, by detaining a thing physically and mentally. However, he also makes the additional qualification that possession can be retained, "even when the physical detention ceases," by mere intention. This is a juridical detail that Summenhart takes to prove that Azo's definition is a causal description. He points out that, if this definition were a formal predication, this would mean that possession would cease when physical and mental detention ceases, "as when the animal ceases, ceases also the man." But this is not the case. According to him, a person who has obtained possession of a house does not lose its possession when he goes out. "Otherwise, one would lose and reacquire possession of the same thing infinitely."[127]

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this definition of possession, Summenhart was able to make clear the factual characteristics that were peculiar to the right of possession.

[125] *Opus septipartitum*, q. 14, sig. F2r: "Secundo arguitur, si possessio est quedam species iuris ut iam et in precedenti questione dictum est, igitur pro suo genere debet poni ius, non igitur detentio."

[126] *Opus septipartitum*, q. 14, sig. F2r: "Respondetur in descriptione formali debet poni genus pro prima parte diffinitionis, sed in causali non oportet, hic autem est descriptio causalis seu predicatio causalis cum dicitur est detentio, et resolui debet in formalem hoc modo, id est ius quoddam quod acquiritur per detentionem…" Summenhart also recognizes that the term possession can be used to signify the thing which is possessed. In this sense possession is taken as *materialiter*, and not *formaliter*. Ibid.: "Respondetur possessio aliquando capitur materialiter pro materia circa quam versatur possessio, scilicet pro re possessa, et hoc modo predia sunt possessiones, sed sic non diffinitur hic. Alio modo formaliter pro quodam iure quod quis habet circa predia vel alias res corporales, et sic diffinitur hic."

[127] *Opus septipartitum*, q. 14, sig. F2r: "…et illud ius derelinquitur in detinente predicto modo, etiam cessante corporali detentione, quod enim non sit formalis predicatio,

The interpretation of Azo's definition of possession as causal predication conditions Summenhart's view of the definition. He concludes that the definition is good up to a point (*aliqualiter bona*). This conclusion has a two-fold rationale. On the one hand, it implies that an adequate inquiry into possession needs to go beyond Azo's definition. On the other hand, it acknowledges that as a causal predication Azo's definition is good or valid. Summenhart notes that in place of the genus term, there is the term "detention" and adds, "here I agree, because according to the laws, possession derives from 'placing the foot.'"[128] This etymological explanation for the term *possessio* derives from the text of *Digesta* (Dig. 41.2.1), although Summenhart has made his version by combining Antoninus's and Hostiensis's explanations. Following his sources, Summenhart notes that possession is said to be "of a corporeal thing," because "according to civil lawyers, incorporeal things are not possessed, except generally or broadly speaking, but are quasi possessed."[129]

The remaining clauses in the definition further specify the detention of a corporeal thing. As for the factual requirement that the detention of a thing should be "physical and mental," Summenhart explains:

> For if I physically took hold of a thing, but would not do that mentally by willing to possess it, this detention should not be called possession. Whence irrational animals do not acquire possession of things, because

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probatur, quia tunc cessante detentione fienda corpore et animo, cessaret possessio, sicut cessante animali cessat homo, consequens est falsum, quia postquam accepi possessionem domus per corporalem actum etiam animo factum circa domum, si postea corporaliter eidem non insistam, non ideo perdidi possessionem, immo adhuc dicor habere possessionem vel esse in possessione domus, alius quis infinities perderet et reacquireret possessionem eiusdem rei." Consequently, the role of the physical act of insisting or standing upon a thing is reduced or specified: to acquire possession one must stand upon a thing in a physical or concrete manner, but once one is in possession of the thing the physical action becomes unnecessary, if not irrelevant.

[128] *Opus septipartitum*, q. 14, sig. F1v: "Tertia conclusio, descriptio possessionis posita videtur aliqualiter bona, probatur per conditiones bone descriptionis, soluendo argumenta possibilia contra eam fieri, et declaratur per singulas clausulas. Primo enim dicitur detentio, que ponitur loco generis, et hoc congrue, quia secundum iura possessio dicitur quasi pedum sessio vel positio." Antoninus described the etymology of possession with the phrase *pedum sessio*, whereas Hostiensis quoted the text of *Digesta* that speaks of *pedum positio*. See Antoninus of Florence, *Summa theologia*, part III, tit. 3, F3r, and Hostiensis, *Summa aurea*, liber 2, De causa possessionis, 525.

[129] *Opus septipartitum*, q. 14, sig. F1v: "Tertio dicitur rei corporalis, quia secundum dominos iuristas incorporalia non possidentur nisi generaliter vel large loquendo, sed quasi possidentur. Exemplum ut ius percipiendi annuum censum vel redditum est quid incorporale."

> they do not have *animus possidendi*. Also those men who are asleep or insane cannot acquire possession, although they remain in possession of things that they have acquired at the time when they were making use of reason.[130]

By the term *animus possidendi*, Summenhart is referring to the intention to possess. Irrational animals cannot possess because they lack the mental capacity that is required for intentional action. Further, *animus possidendi* denotes an express declaration of intent, based on the activity of reason and will. This is why persons who are in a state in which they are unable to express their intentions (for example, because they are asleep or in state of mental disorder) cannot acquire possession. After emphasizing the importance of *animus possidendi*, Summenhart stresses the necessary role of the physical detention in possession. "If I had the will to hold (*tenere*) a thing, but would not take hold of it by any physical act, I would not possess the thing or acquire possession."[131]

The final clause in the definition introduces the factuality of detention with juridically distinctive characteristics. In order to qualify as possession, the detention should take place "by the intervening support of *ius*." Summenhart explains this characterization in the following way:

> Fourthly, it is said "by the intervening support of right," because although someone were to stand on (*insistere*) a thing physically and mentally, but not have the support of *ius*—so that he would have the right to stand on it in that way—he would not be said to possess the thing. Whence, if *ius* resisted it or did not assist it, he would not be said to possess [the thing].[132]

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[130] *Opus septipartitum*, q. 14, sig. F1v: "…nam si corporaliter rem aliquam comprehenderem, si non id agerem ex animo volendi eam possidere, non esset illa detentio dicenda possessio. Unde animalia irrationalia eo quod animum possidendi non habent, non acquirunt possessionem rei nec dormientes, nec furiosi acquirere possunt possessionem, licet acquisitam per eos tempore quo ratione utebantur retineant."

[131] *Opus septipartitum*, q. 14, sig. F1v: "Similiter econtra si rem aliquam apprehenderem solo animo, puta quantum in me esset vellem eam tenere, nec tamen corporali actu eam contingerem nec contigissem per me vel per alium, modo quo nata est acquiri possessio, non dicerer illam rem possidere vel acquisisse possessionem." This is the only time in which Summenhart refers to the acquisition of possession through other persons.

[132] *Opus septipartitum*, q. 14, sig. F2r: "Quarto dicitur iuris adminiculo interveniente, quia quamvis aliquis insisteret alicui rei corpore et animo, si tamen non habet iuris adminiculum, sic quod habeat ius ei sic insistendi non dicitur possidere. Unde si ius ei obviet vel non assit, non dicetur possidere…"

This passage is an example of Summenhart's heavy reliance on sources in discussing Azo's definition. The major part is from Antoninus's *Summa*, and the last sentence is from Hostiensis's *Summa*. In the middle of Antoninus's text, Summenhart has added the qualification—"so that he would have the right to stand on it in that way")—which contains his own interpretation of the "support of *ius*." Summenhart suggests that we may speak of possession only if the person has *ius insistendi*, the right to stand on the thing.[133] In this interpretation, Summenhart departed from his sources, for neither Antoninus nor Hostiensis explained 'the support of *ius*' in terms of *ius insistendi*.[134]

But how can "the support of *ius*" belong to the defining characteristics of possession, when "the thief and robber have possession of the things stolen or robbed," and yet "such a detention does not have the support of *ius*, but on the contrary, *ius* resists such a detention." Following Antoninus, Summenhart recognizes this counter-argument that seeks to prove the thief's possession of stolen goods by making reference to a legal principle that was recognized in both canon and civil law (X. 2.13, Dig. 43.16.1.30). Accordingly, if the person whose things are stolen or robbed takes his things back "by force and by his own authority," then "before anything else the things are to be restituted to the thief or robber so deprived." It seems that this would not be the case if the thief and the robber did not have possession of the stolen things.[135]

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[133] See Antoninus of Florence, *Summa theologia*, part III, tit. 3, sig. F3r, and Hostiensis, *Summa aurea*, liber II, De causa possessionis, 528. As did Hostiensis, Summenhart adds that this is sometimes due to the thing itself, as when the thing is sacred, for sacred vessels could not be possessed either with or without knowledge of their condition. *Opus septipartitum*, q. 14, sig. F2r.

[134] Hostiensis and Antoninus understood the "support of *ius*" to mean that possession was not simply a matter of fact, but was also defined by the law. Furthermore, they explained that the relation between the factual detention and the support of *ius* varied from case to case; sometimes it was factuality that dominated and other times it was juridical construction. See Antoninus of Florence, *Summa theologia*, part III, tit. 3, F3r, and Hostiensis, *Summa aurea*, liber 2, De causa possessionis, 526, 528. In the quotation above, the final sentence stated that *ius* can be related to factual detention in three alternative ways. First, the physical activity is supported by *ius*; secondly, it is resisted by *ius*; and third, it is not assisted by *ius*. This deontic classification (between "for," "against," "unnormed") is evidently used to illustrate that physical control must be directly and explicitly supported by *ius* in order to lead to possession. The requirement is not met in cases in which *ius* is directly against physical control or does not set any norm at all.

[135] *Opus septipartitum*, q. 14, sig. F2v: "Quarto arguitur, fur et raptor habent possessionem rei furate et rapte, et tamen tali possessioni [non] convenit diffinitio illa,

In his reply, Summenhart closely follows Antoninus. He negates the major premise and says that the thief does not have possession, but "has a sort of unjust detention (*detentio iniusta*) of that thing, which is plain detention of fact (*nuda detentio facti*) and not of right." As to the legal principle that is used to verify the thief's possession, Summenhart explains that canon and civil law do not grant possession of the stolen goods to the thief or robber. The principle point is rather that the stolen things should be taken back from the thief "only by the authority of the judge, before whom the things are proved to be stolen." Here Summenhart is referring to the legal principle that "no one is the judge in his own case." He also reports that in the same *decretal*, Innocent III maintained that if a crime is manifest and the true proprietorship undisputed, "then the restitution to the thief is denied, and this is because he has never truly possessed those things, not naturally or civilly, but has only had the unjust detention of these things."[136]

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igitur est mala. Maior probatur, quia si iste cuius fuit res rapta vel furata, propria auctoritate vi accipiat eam de manibus furis vel raptoris furi vel raptori sic spoliato est ante omnia restituenda res accepta, ut patet extra, de restitutione spoliatorum, in litteris, et digesta, de vi et vi armorum, l. ii. § qui a me quod non esset, si non habuisset possessionem rei. Minor probatur quia talis detentio non habet iuris adminiculum, immo ius resistit tali detentioni."

[136] *Opus septipartitum*, q. 14, sig. F2v: "Respondetur maior est neganda saltem de possessione proprie dicta, et illa hic diffinitur, se habet quandam detentionem iniustam illius rei, et hec est nuda detentio facti et non iuris. Ad probationem dicendum quod hoc non est ex eo quod iura velint dicere furem vel raptorem habere proprie dictam possessionem talis rei, sed hoc est statutum in odium spoliantium et auferentium violenter res suas hominibus, et etiam quia nemo potest esse iudex in causa sua, ideo rem furtivam non debeo a fure recipere nisi auctoritate iudicis coram quo ostendam rem esse furtivam unde secundum quod dicit decretalis allegata, ex litteris, hoc fuit introductum secundum iuris rigorem contra iuris equitatem que quandoque prefertur rigori ut ibi dicit glossa, et ideo dicit Innocentius in eadem decretali secundum opinionem probabilem multorum si constaret tunc per suam confessionem ipsum esse predonem, vel constaret de proprietate rei, esset predoni restitutio deneganda, et hoc ideo, quia vere nunquam possedit, nec naturaliter nec civiliter, sed solum habuit detentionem iniustam eius. Nec etiam ista constitutio scilicet quod predo vel fur est restituendus si sit spoliatus re furtiva vel rapta, est constitutio legis divine nec naturalis, sed est positiva ut vult Johannes Gerson in tractatu De unitate ecclesiastica consideratione viii." Here, Summenhart concludes his discussion with a remark that he has taken from Jean Gerson's tract *De unitate ecclesiastica* (consideratio 8), according to which "this regulation which maintains the robber or thief is to be restituted if he is deprived of the stolen or robbed things is not a regulation of divine or natural law, but of positive law."

4.3.4. *Physical action in the acquisition of possession*

In Summenhart's view the physical detention of a thing characterizes possession, but at the same time its role is reduced: physical detention is necessary in acquiring possession, but not in retaining it. But what counts as physical detention of a thing? Summenhart settles this question in a section based on a literal exegesis of Hostiensis's text. Summenhart introduces a counter-argument, claiming that it is false to posit physical detention as a requisite for acquiring possession as the definition has it. The argument proves its claim by referring to an example derived from the *Digesta* (Dig. 41.2.1.21).

> According to civil lawyers, when the keys of a wine cellar or storehouse are delivered to me in front of the cellar or storehouse in the selling of the wine or goods which are in there, possession is considered to be delivered with the delivering of the keys, even without physically seizing these things. There are other examples as well.[137]

This reference to delivering keys as an example of physical detention is a direct quotation from Hostiensis's chapter *De causa possessionis*. The reference to other examples points to Hostiensis's text as well, and Summenhart discusses them later on. At this point, he replies to the counter-argument in a way that clarifies the criteria for physical activity in the acquisition of possession.

Summenhart prepares his answer by making a distinction concerning corporeal things that are suitable for possessing. There are two kinds of things: unowned things and things owned by someone. In speaking of the unowned things, such as "amber on the seashore and birds in the air," Summenhart points out that a person cannot acquire possessions without physically taking them over. Thus, to acquire the possession of amber or birds, it is not sufficient to see them or exercise some other act vis-à-vis them, yet not take them over physically. "Similarly, if I am in a tower and see a thing which has been

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[137] *Opus septipartitum*, q. 14, sig. F2v: "Quinto arguitur, si diffinitio per predicationem causalem intelligeretur, tunc ad acquisitionem possessionis requireretur quod volens possidere, corporaliter apprehenderet rem talem, consequens est falsum. Nam si claves celle vinarie vel horreorum mihi tradideris coram cella vel horreo, vendendo vina vel merces que sunt ibi, tradita videtur possessio per clavium traditionem secundum dominos iuristas, etiam si non apprehendam illas res corporaliter, ita in quibusdam aliis posset exemplificari."

abandoned (*pro derelicto habita*), I will not acquire possession of it through the act of looking."[138]

In speaking of the things that are owned by someone, Summenhart maintains:

> Other things are such that they are—before their ownership or possession is acquired—in someone's *dominium*, and the tradent's will (*voluntas tradentis*) is required, as when you sell me a house or a field. The possession of these things can sometimes be acquired without a physical taking over, as the argument proved, but not, however, without any physical act. For although the reception of the keys is not physical apprehension of the sold things that are in the cellar or storehouse, it is still a physical act. Therefore, when it is said in the definition above [possession] "is physical detention," "physical detention" should be taken as extending to a corporal act, even if it is not a physical apprehension with hands or feet.[139]

The tradent's will (*voluntas tradentis*) was not an issue in the case of unowned things, naturally, because there is no owner to express his will. In the case of things someone owns, the tradent's will is essentially important since the acquisition of possession requires that the tradent express his consent to their delivery.[140] Further, the emphasis put on the deliverer's will reduces the role of the physical taking over in the acquisition of possession. Yet physical detention remains a distinctive feature of the acquisition of possession, although it may be reduced to a physical sign that proves the possessor.

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[138] *Opus septipartitum*, q. 14, sig. F2v: "Respondetur, res quarum quis acquirit possessionem sunt duplices, quedam sic se habent quod antequam earum dominium atque possessio acquiritur, in nullius dominio sunt nec exigitur ad earum possessionem vel dominium acquirendum voluntas tradentis, ut sunt gemme in litore maris et aves in aere, et illarum possessio non acquiritur sine corporali apprehensione earundem. Unde ad hoc quod acquirerem possessionem talis gemme vel avis, non sufficeret quod eam vidissem vel alium actum exercuissem circa eam, si non eam corporaliter apprehenderem. Similiter si suum in turri, et video rem aliquam que est pro derelicto habita, non acquiro pro aspectum oculorum possessionem eius."

[139] *Opus septipartitum*, q. 14, sig. F2 v: "Alie sunt que sic se habent quod antequam earum dominium seu possessio acquiritur, sunt in alicuius dominio, et exigitur voluntas tradentis ut cum mihi vendis domum vel agrum, et illarum rerum possessio potest acquiri aliquando sine corporali apprehensione ut probat argumentum, non tamen sine corporali actu. Nam et clavium receptio licet non sit corporalis apprehensio rei vendite in cella vel horreo, est tamen actus corporalis. Modo in diffinitione predicta cum dicitur, est detentio corporis debet capi detentio corporis ut se extendit ad actum corporalem, etiam si non sit corporalis apprehensio manibus vel pedibus."

[140] In stressing that the "tradent's will" (*voluntas tradentis*) is required, Summenhart is in fact following the Italian canonist Huguccio (d. 1210), whom Hostiensis cited as an authority. See Hostiensis, *Summa aurea*, liber 2, De causa possessionis, 527.

Summenhart summarizes his exegesis on Hostiensis's text by introducing five ways to acquire the possession of previously owned things without physical apprehension. He reports that possession can be acquired by sight, as in "if you sell me your thing that is in the scope of my vision." Secondly, possession can be acquired by the sale of a thing, "as when you have loaned your thing to me, or pledged or deposited it, and then you sell it to me, the thing is taken to be delivered to me and possession acquired." Third, by delivering the keys, as mentioned above. Fourth, by delivering documents. Here, Summenhart refers to *mancipatio*, which in classical Roman law was a formal sale of particular things, *res mancipia*.[141] "If you have sold me *mancipia* (goods or slaves) and you deliver the instruments of *mancipia* to me, that is, the documents that show that I have purchased *mancipia*, then I have possession of the *mancipia*." Fifth, "if I knowingly rent my things, namely, if I constitute myself to possess things in your name." Here, Summenhart is referring to a situation in which a person sells a thing and immediately rents it back so that the thing is not transferred to the new owner. (Dig. 6.1.77). This results in a situation in which the original owner has ceased to possess the thing, because he has sold the thing and because the rental contract does not "move the cause of possession." The new owner is made the possessor through the service of the original owner, "for the one possesses in the name of which it is possessed."[142]

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[141] For *mancipatio* in Roman law, see e.g. Long 1875, 727–728.

[142] To end his discussion, Summenhart refers to the chapter *De causa possessionis* in Hostiensis's *Summa* for a more detailed discussion, thus making explicit his dependence on Hostiensis's text in this passage. *Opus septipartitum*, q. 14, sig. F3r: "Unde nota quod res de isto secundo genere possunt acquiri quinque viis sine corporali apprehensione. Primo *visu. Nam si mihi rem tuam vendideris que in conspectu sit et per aspectum oculorum me possidere iusseris vel procuratori meo precipio tradendam cum in conspectu sit vel custodem apposuero, quamvis corporaliter non apprehendam, tamen possessionem acquiro*. Secundo venditione rei, puta *commodasti mihi rem tuam vel pignore obligasti vel deposuisti penes me et ipsam mihi vendis, tunc eo quod pateris meam esse*, videtur illa res mihi tradita et quod ego acquisiverim possessionem eius. Tertio clavium traditione, ut deductum est in argumento. Quarto cartarum traditione, puta si vedidisti mihi mancipia et tradis *mihi instrumenta mancipiorum*, id est cartas *in quibus continetur qualiter mancipia emisti*, habeo possessionem mancipiorum. Quinto si scienter conduco mea *scilicet constituendo me possidere nomine tuo cui vendo nec enim causam possessionis mihi muto, sed desino possidere et alium ministerio meo possessorem constituo, is enim possidet cuius nomine possidetur.* De istis vide diffusius in summa Hostiensi, in titulo de causa possessionis." Here, I have italicized those parts that are direct quotations from Hostiensis's text.

4.3.5. *Possession as a right*

As noted above, Summenhart defends Azo's definition of possession as a causal predication that explains how possession is acquired. Yet his approval of the definition was qualified: the definition was good up to a point (*aliqualiter bona*). In a later chapter, Summenhart states his reasons for this view:

> In the third conclusion I specifically said that this description is good to some extent, but not in every way. For although it says how [possession] is caused, it does not explicitly say what it is formally, and taken that it intends implicitly to say that it is a right, which is caused by detention, it does not say, however, which are the effects or acts of this right by which this right is distinguished from other species of rights. Therefore, it is not entirely good, but there is a certain defect.[143]

Summenhart does not seem to intend his criticism to be severe. He even softens his critical tone by quoting Javolenus's famous dictum: "any definition is dangerous in law." (Dig. 50.17.202)[144] No definition is perfect enough to escape criticism. Nevertheless, Summenhart's critical remarks spell out his preference for discussing possession with the assistance of a formal definition, which differentiates possession from other property rights, including ownership and usufruct.

To complement the first definition and to show that generally in jurisprudence possession is taken as a right, Summenhart cites four definitions of possession. These definitions were composed by four distinguished medieval lawyers: Johannes Bassianus, Portius Azo (again), Jacobus de Ravanis, and Bartolus of Saxoferrato.

> The second definition was given by Johannes [Bassianus] who said: possession is a right of retaining a thing with oneself. The third [definition] which Azo gave in his *Primis annis studi*, is a right by which a person has a corporeal thing with oneself, really or by interpretation. The fourth [definition], which Jacobus de Aretio [i.e., Jacobus de Ravanis] gave is a right obtained by physical and mental apprehension of a corporeal thing,

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[143] *Opus septipartitum*, q. 14, sig. F2v: "Dixi autem notanter in conclusione tertia quod illa descriptio est aliqualiter bona, non autem omnimode, quia licet dicat quomodo causetur non tamen expresse dicit quid sit formaliter, et dato quod implicite velit quod sit ius causatum ex ipsa detentione, tamen non dicit qui sint effectus vel actus illius iuris per quos hoc ius distingueretur ab aliis speciebus iuris, ideo non est omnino bona, sed est quedam notificatio."

[144] *Opus septipartitum*, q. 14, sig. F2v: "Unde peritissimi nesciverunt diffinire eam, ut dicit glosa quedam iuris civilis. Unde et omnis diffinitio in iure periculosa est ut dicit iurisconsultus."

> with the conceding support by *ius*. The fifth is Bartolus's and is the right of standing on (*ius insistendi*) a thing not prohibited from possessing.[145]

The definitions quoted by Summenhart exemplify how the medieval lawyers were eager—in the absence of Roman definitions—to take up possession with the aid of a detailed definition. In this passage it is also possible to identify Summenhart's source—probably Bartolus of Saxoferrato's *Lectura super prima parte digesti novi*, because all of these definitions appear in that treatise in the chapter *De acquirenda possessione*, and even in the same order.[146] Summenhart also continues with Bartolus's definition and explains—following Bartolus—that the expression the "right of standing on" differentiates possession from ownership (*dominium*) and usufruct. "For ownership is the right of selling and disposing of the thing as one pleases," and usufruct is "the right of using and enjoying" a thing.[147]

The introduction of these definitions is followed by a section in which Summenhart reviews all the definitions of possession with a critical eye. He recognizes that in contrast to Azo's causal description, the four definitions quoted "express what possession is formally and by its quiddity, because they say that possession is a right."[148] Summenhart is not, however, fully satisfied with any of these definitions. His view is

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[145] *Opus septipartitum*, q. 14, sig. F2r: "Secunda ergo est quam dedit Johannes dicens, possessio est ius quoddam rem retinendi sibi. Tertia quam dedit Azo in primis annis studii sui est, ius quoddam quo quis rem corporalem vere vel interpretative sibi habeat. Quarta quam dedit Jacobus de Aretio est ius quoddam questitum ex corporalis rei apprehensione corpore et animo et iuris adminiculo concedente. Quinta est Bartoli et est ius insistendi rei non prohibite possideri."

[146] It seems that Summenhart made some mistakes in the authors' names and their abbreviations in Bartolus's text. In a way that was customary in medieval jurisprudence, Bartolus used the abbreviation "Iob." to signify Johannes Bassianus. It may well be that Summenhart was not familiar with this abbreviation, and therefore, he speaks simply of Johannes. Bartolus also used the abbreviation "Ia de are." to signify Jacobus de Arena and not Jacobus de Aretio as Summenhart suggests. Finally, the definition that Summenhart attributes to Jacobus de Aretio (i.e., Arena) was infact composed by Jacobus de Ravanis (abbreviation: Ia de ra). This appears to be a careless mistake on Summenhart's part, for Bartolus had quoted de Arena's and de Ravanis's definitions of possession one after the other. See Bartolus of Saxoferrato, *Lectura super prima parte digesti novi*, De acquirenda possessione, sig. K1v.

[147] *Opus septipartitum*, q. 14, sig. F2r: "Et in hoc quod dicitur insistendi, distinguitur possessio a dominio et ab usufructu. Nam dominium est ius vendicandi et disponendi de re ad libitum. Similiter per hoc distinguitur ab usufructu, quia ille est ius utendi et fruendi." Cf. Bartolus of Saxoferrato, *Lectura super prima parte digesti novi*, De acquirenda possessione, sig. K1v.

[148] *Opus septipartitum*, q. 14, sig. F2r: "Inter illas autem descriptiones prima est causalis et exprimit modum per quem diffinitum acquiritur, non autem dicit quid

that the definitions do not correctly identity the effects of possession. What does Summenhart mean by the effects of possession? According to him, the first effect of possession is "the terminus at which a right is terminated, as a relation is terminated at its terminus." Here, the term "terminus" refers to the thing as well as to the action, which is exercised with respect to the thing. Accordingly, Summenhart defines the right of possession as "to stand on a thing" (*insistere rei*) as its effect or terminus. Summenhart remarks that this first effect is missing from the definition of possession by Jacobus de Ravanis (which he erroneously attributes to one Jacobus de Aretio), but it appears in the other definitions. Yet he points out that even these definitions (by Bassianus, Azo, and Bartolus) fail to mention the other two effects of possession.[149]

Whereas the first effect of possession reflects Summenhart's own paradigmatic view of a right as a relation, the other two could be characterized as effects of possession in the sense of legal consequences. As the second effect, Summenhart points out that possession is "destined to lead to the acquisition of ownership." This is an implicit reference to the concept called *usucapio*, which in Roman law was a recognized mode of acquisition of ownership. Basically, the idea of *usucapio* was that a person could acquire the ownership of a thing directly by possessing it for an appropriate amount of time if no legitimate claims challenging the title of ownership were presented during that time.[150] Summenhart's third effect of possession is that possession is "destined to produce an interdict, which is habitually given for the sake of recovering the possession."[151] This is a reference to the legal protection of possession. In Roman law possession was protected by the so-called

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formaliter sit. Alie autem sunt formales dicentes quid sit formaliter et quiditative possessio, quia dicunt quod sit quoddam ius."

[149] *Opus septipartitum*, q. 14, sig. F2r: "Et quarta ex illis dicit tamen in generali quid sit formaliter possessio, quia dicit tantummodo ipsam esse ius et unde causetur, sed non dicit effectum illius iuris qui effectus est terminus in quem terminatur ius, sicut relatio terminatur in suum terminum, sed alie quattuor etiam exprimunt effectum et terminum eius, quia illud ius habet pro effectu et termino, hoc quod est insistere rei, licet non exprimant omnes effectus eiusdem."

[150] Thomas 1976, 138, 157–159. For *usucapio* in *Corpus Iuris Civilis*, see Dig. 41.3 and C.7.26–31.

[151] *Opus septipartitum*, q. 14, sig. F2r: "Est enim alius effectus illius iuris, scilicet possessionis quod ipsum natum est inducere acquisitionem dominii, et eorum que ex eo sequuntur. Item alius et tertius est quod ipsum natum est producere interdictum quod pro recuperanda possessione dari consuevit."

possessory interdicts. These were legal remedies that safeguarded possession from outside interference.[152]

The final turn in Summenhart's discussion is what might be expected: He summarizes the aforesaid points with the introduction of his own definition of possession, which states: "the formal and quiddative reason of possession together with the cause and the effects of possession."[153] Accordingly, possession

> …is the right of having, retaining a corporal thing, and standing on it, destined to lead to the acquisition of *dominium* and those that follow it, destined also to produce a certain interdict, which right is acquired by physical and intentional holding that takes place with the concurrent support of *ius*.[154]

In describing possession as the right of having, retaining, and standing on a corporal thing, Summenhart combines the attributes that were mentioned in the lawyers' definitions. This formulation brings possession close to the static aspects of ownership. Possession is a principle of agency, but the action is static by nature: having, retaining, and standing on.[155]

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[152] In a case of factual (or otherwise unauthorized) seizure of the thing, the possessory interdict provided the possessor a way to recover his possession in court. The possessory interdicts guaranteed that a possession could be revoked or negated only through legal proceedings. See Thomas 1976, 138. For interdicts in Roman law, see Thomas 1976, 114–117.

[153] *Opus septipartitum*, q. 14, sig. F2r: "Illos igitur effectus simul accipiendo posset dari talis descriptio que diceret formalem rationem et quiditativam possessionis una cum causa per quam causatur et cum effectibus procedentibus ab ipsa possessione…"

[154] *Opus septipartitum*, q. 14, sig. F2r: "…est ius rem corporalem habendi, retinendi ac eidem insistendi, natum inducere acquisitionem dominii et eorum que ex eo sequuntur, natum etiam producere quoddam interdictum quod ius acquiritur per detentionem corpore et animo factam iuris adminiculo concurrente."

[155] In speaking of the interdict, Summenhart notes that he did not mention in the definition specifically what kind of interdict possession introduces. The reason for this omission is a formal one: because then it should be added that the interdict "is habitually given for sake of recovering possession." This would entail that the name of the defined, that is "possession," be posited in the definition, which is inappropriate. Summenhart further observes that this defect burdened Bartolus's definition of possession given above. This clarification of the possessory interdict exemplifies Summenhart's inclination to formal accuracy, which naturally accounts for his criticism of the lawyers' definitions of possession.

SUMMARY

The basic premise of this study was that Conrad Summenhart's discussion of rights in his *Opus septipartitum* can be read as the composition of a theory of individual rights. Further, Summenhart's theory was reviewed as a contribution to the ongoing medieval discourse on rights, and with this rationale the first part of the study concentrated on earlier discussions of rights as the background to Summenhart's theory.

In the first chapter, special attention was paid to the so-called "debate over Franciscan poverty," beginning in the middle of the thirteenth century. From the viewpoint of the history of rights discourse a central feature characterizing the early phases of this debate was the dichotomy between two realms: the factual realm and the realm of rights. Bonaventure defined this dichotomy by positing a distinction between the factual use of things, characteristic of Franciscan poverty, and dominion, which belonged to anyone who possessed any rights in material things. This equivalent treatment of *ius* and *dominium* implied that a right was associated with power. According to Peter John Olivi, the power of "right" was categorically different from natural agent power. The power of "right" was called "power" because of its obliging force and was not power in the sense of physical power. This was the dichotomy between the realms of fact and of right as expressed in terms of power.

In the fourteenth century, the usage of the term "right" became more reflective, and authors began to elaborate on what is meant by the term "right." The Dominican Hervaeus Natalis made the connection between right and power explicit by explaining that a right is power over a thing by which one can licitly use that thing. Hervaeus's definition was conditioned by the dichotomy between fact and right, and from this position he concluded that the use of things merely by the power of fact was illicit.

William Ockham's formulations marked a transition in the Franciscan discourse. His terminology was not original; like Hervaeus, he defined *ius* (or the right of using) as a licit power to use things. Yet Ockham gave up the dichotomy between right and fact that had conditioned Hervaeus's definitions. The result was that a right was not

understood as categorically different from agent power, but rather as a licit power of acting. The principle significance of this change was that it opened the way to specifying the concepts of the language of rights with the aid of the sophisticated terminology that had been developed within the language of natural philosophy.

This development was opposed by Richard Fitzralph. Fitzralph's argument introduced a theological theory of dominion based on grace into debate over Franciscan poverty, which reinforced the association between a right and a superior position or dominion. Fitzralph's language of rights was hierarchical in nature; he defined dominion in terms of right or authority, denying the validity of the approach in which a right was defined in terms of power or faculty.

The inquiry into the medieval background of Summenhart's theory ended with two authors whose works Summenhart used as his source texts: the Italian Dominican Antoninus of Florence and the French conciliarist theologian Jean Gerson. Antoninus's language of rights exemplified the long-lasting influence of the debate over Franciscan poverty, for he based his ideas on Hervaeus Natalis's formulations of "right." Yet Antoninus read Hervaeus from a post-Ockhamist perspective, refuting the equivalence of *ius* with *dominium*, and defining a right as a power to exercise actions licitly.

Jean Gerson's influence on Summenhart was fundamental; broadly speaking, it can be said that Summenhart wrote his theory on rights in the language that had been composed by Master Gerson. Gerson addressed and refuted Fitzralph's conclusions concerning dominion and rights. As far as dominion was concerned, Gerson accepted Fitzralph's basic idea that man has no dominion except that which is given to him by God. Yet Gerson rejected Fitzralph's interpretation, which took the ontological state of grace as the necessary foundation for the dominion possessed by man. According to Gerson, God gives himself to man in many gifts, several of which can serve as the foundations for dominion. As far as rights were concerned, Gerson agreed with Fitzralph that the association of a right with power establishes a connection between the language of rights and the language of natural philosophy. Unlike Fitzralph, Gerson did not disprove this association. He pursued the implications of the term "power" in natural philosophy and attributed rights to animals and other creatures. To secure *ius* as a normative concept, Gerson utilized the ancient principle of justice *ius suum cuique* and introduced a definition in which rights were seen as derived from justice.

The latter part of this study made an effort to reconstruct Summenhart's theory of individual rights. The second chapter focused on clarifying Summenhart's concept of an individual right. Gerson's language of rights formed the starting point for Summenhart's discussion. In reviewing the idea of right as power, Summenhart adopted Gerson's terminology, making further use of the language of natural philosophy. In this respect, Summenhart's theory managed to bring an end to a particular continuity of thought that was centered on the view in which a right was understood to signify a power to licit action. Perhaps the most significant feature of Summenhart's discussion was the way he explained the implication of liberty in Gerson's language of rights. Citing the Roman law definition of *libertas*, Summenhart introduced the natural right of liberty by which man has a natural right to do whatever he is able, unless this action is prohibited by law. In the form of *libertas*, Gerson's idea of the general, God-given rights of every creature came into the discussion, as they concerned moral actions in economic life. In the course of his argument for the individual's freedom of action in society, Summenhart assimilated *libertas* into self-mastery or dominion, which in the economic context of the discussion took the form of (a moderate) self-ownership.

Summenhart's discussion of the concept of individual rights also introduced two apparent extensions to Gerson's terminology. First, Summenhart classified a right as a relation, and second, he equated a right with dominion. These classifications demonstrated how Summenhart viewed Gerson's terminology on rights from a perspective that could be described as scientific. Summenhart's description of a right as a relation ignored the normative or material characteristics of rights, and instead viewed rights from a standpoint that was strictly formal. The main point was that, as a relation, a right could not be predicated solely of the right-holder. This served to broaden the object of analysis. An adequate concept of a right presupposed additional knowledge of the foundation on which the right is based, and also of the termini by which the right is determined. It is characteristic of Summenhart's view that he took action to be the primary determinant of a right: "Everyone has as much right or dominion in regard to a thing, as it is licit for him to exercise actions in regard to the thing."

The equivalence between right and dominion expressed another viewpoint concerning rights that was alien to the way Gerson defined the term. In a way, this equivalence answered the question: How does a right appear in the relationship between the subject and the object?

It is distinctive of Summenhart's view of dominion that he defined "dominion" in terms of action. Here, the meaning of the term "dominion" was derived from the discourse on natural philosophy. To have a right or dominion was to be the agent who dominated the patient by his actions. The patient was under the action of the *dominus*, and he, she, or it could not do anything but consent to the action.

The third chapter focused on clarifying Summenhart's account of species dominion. Summenhart's theory provided an answer to the question of what kinds of rights exist and thereby clarified the implications of the concept of an individual right. The central feature in Summenhart's discussion was his conscious effort to systematize Gerson's language by combining classifications of dominion into a coherent whole. Summenhart followed Gerson in associating the six-fold nature of dominion (*beatificum, originale, gratificum, evangelicum, canonicum*, and *politicum*) with the theory of dominion that Gerson had explicated in *De vita spirituali animae* in his reply to Richard Fitzralph. Summenhart's method culminates in the definition he used to clarify the individual species of dominion (except the canonical dominion).

Quantitatively speaking, evangelical dominion dominates Summenhart's discussion. He equated the evangelical dominion with ecclesiastical power and delivered a commentary on the basic classifications of ecclesiastical power, which Gerson had discussed in his *De potestate ecclesiastica*. Summenhart's commentary had a twofold nature: while he evidently sought to preserve the basic tenets of Gerson's account, his approach differed from Gerson's in two important respects. First, Summenhart's principle of interpretation was a view of ecclesiastical power as evangelical dominion, which was not shared by Gerson. Consequently, Summenhart did not approve of canon law and canonical jurisdiction as ecclesiastical powers. Second, by jurisdictional power Summenhart understood exclusively the power to judge. This led him to draw a line of demarcation between jurisdictional power and the power of order differently from Gerson, who had not held such a strict conception of jurisdictional power.

Qualitatively, that is, in expressing his ambitions to systematize Gerson's language, Summenhart allowed natural dominion to dominate his discussion of species of dominion. He criticized Gerson for not being clear about the distinction between original dominion and natural dominion in the theory of *De vita spirituali animae* and also for omitting natural dominion from the six-fold classification of dominion. Summenhart treated natural dominion as a species of

dominion fully comparable to the species mentioned in the six-fold nature of dominion. He constructed the concept of natural dominion by making use of the concepts of foundation (founded on a natural gift) and law (according to natural law). In that way he connected the foundation-based classification with the law-based classification, reconciling both to the six-member classification of dominion.

In defining natural dominion as dominion founded on a natural gift, Summenhart attributed natural dominion to animals and even to heavenly bodies. In defining natural dominion as dominion that is appropriate to someone according to natural law, he was able to treat God's dominion as natural dominion. This was due in part to Summenhart's specific understanding of natural law. He defined natural law as the inner law of reason, by which he meant that natural law is founded on natural reason. He suggested that natural reason is logically prior to the dictates of natural law. In that way "reasonableness" was made the primary criterion for natural dominion at the expense of any metaphysical considerations. In discussing man's natural dominion, Summenhart pointed out that canon and civil dominion can also be said to be founded on natural gifts. This meant that man's natural dominion is not sufficiently identified by its foundation, but requires further qualification, which Summenhart found in the idea that natural dominion is appropriate to a subject according to natural law.

The fourth chapter focused on clarifying Summenhart's discussion of property rights as defined by positive law. If the relevance of the first part of Summenhart's theory is based on what he says in explaining the concept of an individual right, and the relevance of the second is due to the way he systematized Gerson's language on dominion, the importance of this third part lies in its very existence. By delivering an account of juridical property rights, Summenhart connected his philosophical and theological theory of rights with the juridical language of his time and demonstrated that his own language of rights was compatible with current juridical terminology.

Summenhart's guide to juridical terminology was the Dominican theologian Antoninus of Florence, who had discussed property rights in the third part of his *Summa theologia*. While Summenhart did not refer to Antoninus's *Summa* explicitly, he closely followed the disposition of Antoninus's account. His primary juridical source was Hostiensis's *Summa aurea*. However, the basic terminology derived from the glossator Portius Azo, who had been Hostiensis's primary source in the language of Roman law. In discussing possession, Summenhart also relied on Bartolus of Saxoferrato's *Lectura super prima parte digesti*

novi. Summenhart's juridical sources could thus be characterized as traditional and do not reveal any special acquaintance with the contemporary juridical discourse.

Following the example of Antoninus of Florence, Summenhart prepared his discussion of property rights with a justification of private property. This discussion was also suggested by Summenhart's own theory of the species of dominion. In arguing that private property was established by the civil dominion, he maintained that civil *dominium* placed over man's natural dominion that remained undivided under civil *dominium*. This model of two orders or two levels of dominions implied a problem that Summenhart solved: if the things of this world are common to all under natural *dominium*, even today, how can it be morally justifiable to appropriate things under civil *dominium*?

In his solution, Summenhart gave private property a direct and strong natural law-based justification. In his view, natural law dictates that private property be established in the reality of fallen man. Yet he also maintained that natural law was of such a nature that it could not bring private property into being. This was because the institution of private property presupposed someone or something having the power and the will to dictate that this thing belongs to this person and that thing belongs to another person. In other words, the institution of private property presupposed positive law. Summenhart established two criteria for a just positive law. First, he required that the lawmaker have legitimate power over those whom the law concerns; second, the lawmaker must be prudent or have prudence in the sense that he has prudent advisors. This was a Scotist position, which was also maintained by Summenhart's immediate source, the Dominican Antoninus of Florence. Following Antoninus, Summenhart suggested three alternative ways that would lead to a just division of dominions by positive law. The distinction could have been done, first, by a law enacted by the person who has paternal power and second, by a law dictated by the political ruler. Third, things could be divided and appropriated by common agreement, a procedure that did not presuppose the existence of any superior power. In recognizing common agreement as a legitimate source of positive law, Summenhart attributed to the community of equals the ability to function as a legislator and thus literally be an autonomous community.

Summenhart's discussion of the four property rights—*usus, usufructus, proprietas*, and *possession*—offered a detailed report of the usage of these concepts in juridical discourse. His discussion was characterized

by extensive use of the juridical source texts, which was more direct and wordy the more his discussion became entangled with the details of juridical doctrine. At the same time he promoted his own language of rights, especially by applying the idea of a right as a relation. He also made effort to systematize the juridical language related to property rights.

Summenhart described *usufructus* as the juridical right to exercise the external acts of using and enjoying material things. *Usufructus* was taken as a servitude or burden on ownership, and it was "not compatible with ownership and *dominium perfectum* over the same thing in the same subject." Further, only non-consumable things could be objects of usufruct. Summenhart described *usus* with similar qualifications, except that he separated *usus* from *usufructus* by defining *usus* as "the right of using but not enjoying" a thing. In this part of his commentary, Summenhart presented his view of a right as a relation, maintaining that as rights, *usus* and *usufructus* are relations and can be analyzed accordingly. He pointed out that "using" ("and enjoying") are the proximate termini and "things" the remote terminus in the relation of *usus* (and *usufructus*). By basing his discussion on the terminology that was current in medieval jurisprudence, Summenhart acknowledged the relevance of a broader meaning of *usufructus* by which an owner could be said to have the usufruct called causal usufruct. In a similar fashion, he also noted that consumable things could qualify as objects of a usufruct called quasi-usufruct. Summenhart's goal of systematizing the terminology appears in his argument for the recognition of causal *usus* and quasi-*usus* on similar terms as the causal and the quasi-usufruct.

Summenhart also clarified the relationship between usufruct and *dominium utile* that had been the subject of debate in earlier juridical discourse. His view was that intrinsically, that is, in light of the characteristics mentioned in the definition of usufruct, there is no difference between usufruct and *dominium utile*. Nevertheless, he maintained that, despite this, extrinsic circumstances may justify speaking of *dominium utile* as distinct from usufruct. As an example of such a difference, he pointed out that the holder of *dominium utile* can sell the right itself in addition to the products of the thing, whereas the holder of the common title *usufructus* can only sell or distribute the products of the thing.

Summenhart's discussion of ownership (*proprietas*) was based on Azo's definition, which equated *proprietas* with *dominium* that is

acquired in a just way. On the basis of his own theory of the two-fold meaning of dominion, Summenhart took this equation as valid "only if dominion was taken strictly as that dominion and a right that is *simpliciter ius in re*." By this was meant a right that is had, not only to use a thing, but also, to the thing itself or the substance of the thing, so that the right-holder "can consume or dispose of the thing by selling and donating it to another."

In clarifying just acquisition as a criterion for ownership, Summenhart suggested that it would not be wise to place very strict normative or moral requirements on the validity of ownership. In the example case, which concerned a prostitute's ownership of her salary, the requirement of just acquisition presupposed that there was no law prohibiting the prostitute from accepting a sum of money given to her by a customer.

Summenhart's discussion of possession was also based on Azo's definition. Yet Summenhart consistently treated possession as a right, whereas in Azo's definition, possession was characterized by factuality: by the physical and mental detention of a corporal thing. From Summenhart's viewpoint, Azo's definition was inevitably one-sided: it described how possession is acquired, but not what possession is. Yet Azo's definition gave Summenhart the opportunity to discuss the factual aspects that were distinctive of possession and made possession special among property rights. In clarifying these details of possession, Summenhart depended heavily on Hostiensis.

In order to show that possession is in general understood as a right in juridical discourse, Summenhart quoted four other definitions of possession, which he seems to have taken from Bartolus's *Lectura*, and gave a critical assessment of these definitions. In the process, Summenhart reviewed possession in light of his concept of a right as a relation, pointing out the terminus of possession. Summenhart's critique led him to introduce his own definition of possession. He did not, however, claim that his definition was an alternative to lawyers' definitions. More likely, his definition appeared as a compilation of the stated definitions, with some basic characteristics added that were associated with possession in the general juridical discourse. More than anything else, Summenhart's definition was an expression of his ambition to systematize existing concepts. Although Summenhart did not claim to be an expert in law, he sought to make his own contribution to the discourse on property rights by systematizing the related juridical language.

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